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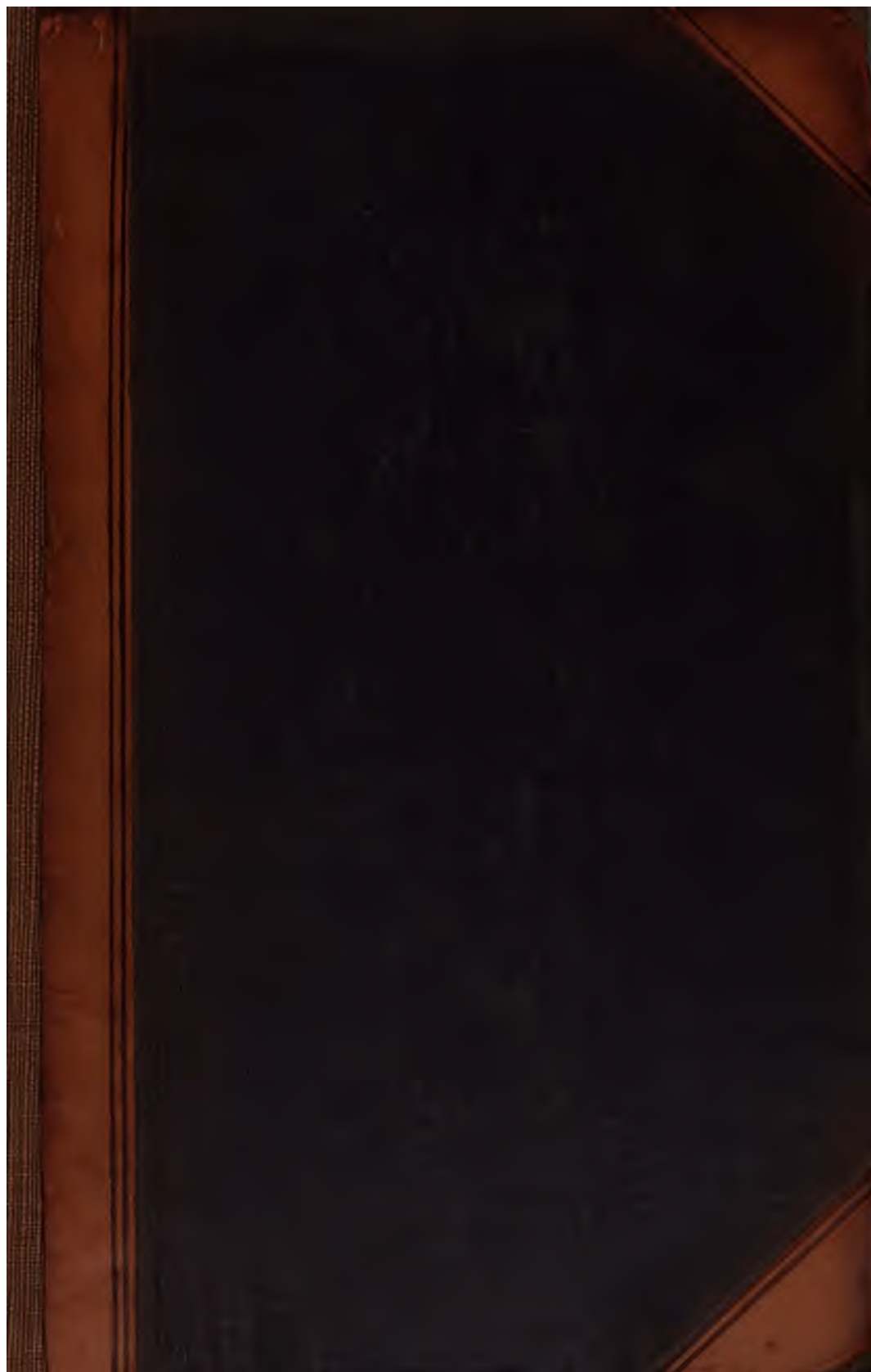
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THE  
LAW MAGAZINE

AND  
LAW REVIEW;

OR,  
*Quarterly Journal of Jurisprudence.*

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FEBRUARY TO AUGUST, 1867.

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VOLUME XXIII.



LONDON :  
BUTTERWORTHS, 7, FLEET STREET,

*Printed by Publishers to the Queen's Most Excellent Majesty.*

EDINBURGH : T. & T. CLARK, AND BELL & BRADFUTE.

DUBLIN : HODGES, SMITH, & CO.

MELBOURNE : GEORGE ROBERTSON.

CAPE TOWN : SAUL, SOLOMON, & CO.

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1867.

LONDON:

FAIRFALL & CO., PRINTERS, VICTORIA PRESS, 88A, FARRINGDON STREET, AND 1A, PRINCES  
STREET, STOREY'S GATE, WESTMINSTER.

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(NOVEMBER, 1866.)

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dropped throughout this narrative) was a banker at Derby. His family, which ranked amongst those of the gentlemen of England, was one of those good old stocks in the middle ranks of life, from which arose in the time of the Civil War between Charles and his Parliament some of the greatest and most steady supports of the endangered rights and liberties of the people. The Cromptons descended from Puritans and Round-heads, men who, whatever the faults or narrowness of many amongst them, were nevertheless grand specimens of a fine old English breed, a descent from whom, though once subject to obloquy, is now justly accounted an honour. The judge came therefore from a good old stock, and the rough strong wine, mellowed and matured by time, had lost neither its colour nor its flavour. His political creed was a somewhat popular version of the text of our mixed form of government, but his reading of the constitution, though democratical, was at the same time loyal, liberal and consistent. The law speaks of the king, of the peers, of the clergy, and of the commons of the realm. It ignores the accidental distinctions of rank amidst the commons, which society recognizes, and which have been made, perhaps unwisely, the basis of some modern legislation.

Charles Crompton never sat in Parliament. He had no opportunity of testifying there to his opinions, though he twice presented himself as a candidate on the hustings; once at Preston in 1832, on the first general election after the passing of the Reform Bill, and once at Newport in the Isle of Wight, in the year 1848, when, though again unsuccessful, he made a nearer approach to success. His defeat can scarcely be accounted a misfortune. His subsequent elevation to the Bench could by none be ascribed to his votes in Parliament. No voice cavilled at the appointment, and all acknowledged the true cause of his promotion to be his well-earned fame as a lawyer.

A family connexion existed between the Crompton family and some of the Parliamentary leaders in the Great Rebellion. President Bradshaw, who descended from an ancient Lancashire family, was connected with the Cromptons. The late judge

would sometimes mystify his juvenile hearers by declaring that the last judge in his family had tried a very illustrious prisoner. From such a descent, naturally flowed those popular principles which have invariably been maintained by the whole line of the Cromptons, who, different from the temporizers, and not of the *vespertilio* class, as fabled, have in good and in bad repute, in good and in bad times alike, as well in the blast as in sunshine, been found ever the firm, unflinching, consistent advocates of the popular cause—of that which they esteemed to be the true cause of civil and religious freedom.

Dr. Crompton was educated for the medical profession, and studied first at Edinburgh and then at Leyden, where he took his degree. By the death of his elder brother he inherited a considerable property. On his succession to that inheritance he ceased to practise medicine as a profession, but he did not abandon it as a pursuit. Possessing a great love of his profession, with considerable knowledge of it, and swayed, as he ever was, by that strong love of his kind, which was afterwards even more touchingly and fully developed in his son Charles, manifested by the latter in his friendly and equal intercourse with those inferior to him in station, the Doctor might have been seen—to use the potential mood, so great a favorite with novelists—going his gratuitous rounds on horseback amongst the poor, through a wide scattered district then but thinly peopled. He rode not unaccompanied, for his youngest daughter, then a young girl, was commonly seated on a pillion behind him. These kindly services in conjunction with his cordial manners made him very popular amongst his poorer neighbours, but one of the people in his vicinity, who had not apparently much faith in human nature, somewhat cynically supposed that the doctor had obtained his land on condition of attending the poor “as he was sure nobody would do so much for nothing.”

In 1787, at the early age of 21, Dr. Crompton married Mary Crompton, his second cousin. She was born in 1759, and was therefore seven years older than her husband. She was the daughter of John Crompton, of Chorley Hall, Lancashire, a

property which her grandfather had purchased in 1715 from the Crown, whose title arose by forfeiture for treason.

Mrs. Crompton, the mother of the late judge, was a woman of no common stamp. She was beautiful, but her beauty of person was the least of her attractions. Gifted with an excellent understanding, she had not suffered her talent to lie buried. Her mind was highly cultivated, and her manners were elegant and refined. Modest and retiring, she kept in the background; there was not a note of the parrot in her talk, nor the slightest shade of blue in her stockings. A common mind might have failed to appreciate her, but to one extraordinarily gifted mind she appeared as she was. The Poet Coleridge knew her intimately, appreciated and admired her character. He spoke always with a just sense of her high and tender nature. He could not fail to see in her, "how divine a thing a woman may be made." He called her "angelical," and used to say that he "always expected to see wings start from her shoulders." This sketch, for a sketch only has been attempted, of the parents of Charles Crompton, will suffice to show that some of his own best qualities, his freedom from affectation, pretension, and vanity, his genial natural character, and the love and tenderness which underlay every part of his inner man existed in the sources from which his being was derived. If the corrupted spring mantle into a fouler pool, and the vicious race produce descendants—

*"mox daturos*

*"Progeniem vitiosiore"*

let us cherish the hope and trust that virtuous inclinations, sweet affections, and improved qualities of mind and body, are by the same general law, and in an equal degree, impressible and impressed.

Such a woman as Mrs. Crompton would naturally acquire a great influence for good over her children, and deep and lasting—ineffaceable, indeed—was the impression that her virtues, her talents, and her sweetness produced upon the minds of her children. The most tender affection existed ever between

her and her son Charles. He kept up, when absent from home, a constant correspondence with her, collecting and sending to her all the news of the day likely to interest her, not abstaining from the political topics of the times, a subject on which her interest was always sustained, and upon which her opinions, rational though strong, based upon her principles of right, and not flowing from envy or hate, had in them nothing unfeminine, and were expressed with equal intelligence and zeal. She was present at the State Trials in 1794, and heard Erskine's defence of Horne Tooke. She used to describe the trial with much animation and graphic effect. A mind of that order could appreciate the magnitude of the danger to liberty involved in a charge of constructive treason, based on such wide and unjustifiable inferences of intention. She could appreciate at once the power of the advocate and the greatness of the issue. She might exaggerate the peril to her own mind, for she was not free from a terror of a closer and private relation to herself. She believed that had the Crown obtained the verdict, her husband and some of his friends, active and ardent advocates of reform in the representation of the people, might, from the belief of the prosecutors that treason lurked disguised under a specious pretext of a constitutional remedy, have been involved in the meshes of that new criminal drag net; fears which, though they may appear now overwrought, were natural enough, and not lightly conceived at a time when men viewed each other as tyrants, or *fautors* of tyrants, on the one hand, as rebels, or *fautors* of rebels, on the other, seeing each other dimly by the lurid light of those bad times, when a terror, rational had it been moderate, of the spread of a spirit of impiety and cruelty, for a short time rampant in France, had turned aside the current of popular favour from the cause of liberty, through a horror of the crimes lately perpetrated in its name.

The school-days of the late judge were not happy days, and they pained him in the retrospect. It was not a part of his life on which he loved to converse. He thought that he had

not been understood there, and had undergone treatment not cruel, nor unkind, but injudicious. He was a bashful and retiring boy. He was at all times, equally in his later as in his earlier years, diffident of his own powers, distrustful of himself, and over sensitive to ridicule, and when he was smarting under it, the discouragement which ensued led him to exaggerate to himself the disadvantage of the defects of person, manner, and pronunciation from which he was not free. He had been exposed at school to ridicule and a sort of rough banter, of a character which such a spirit cannot brook. He withdrew into himself, and did not expand in that ungenial climate. Some portion of that aversion from general society which he constantly manifested, though by his wit and humour calculated to divert it, may be fairly ascribed to this early check which a naturally genial disposition underwent. In his happier hours, in a small private society with his intimates, he was social, happy, and happily communicative of himself; then the true man came out—the playmate, companion, confidant, and friend of the young—genial, jocose, learned, wise, and witty; wise enough not to disdain sometimes to play the fool. A “solemn humbug” was always his abhorrence. He laughed at one who “talked sentences,” and a conceited fool and he mutually repelled each other.

From school he went at the early age of fifteen to Trinity College, Dublin. Here the frost of his mind disappeared, he passed creditably through the usual course of college tuition, and that he neither neglected nor failed to benefit by the studies of the place may be inferred from the academical honours which he gained in the years 1814, 1815, and 1816. In Ireland he gained many valuable friends, to whose society and its influence in the formation of his character he held himself largely indebted. A gentleman then resident in Dublin, who afterwards became his brother-in-law, Robert Hutton, was one who, in the grateful recollection of the judge, stood foremost in the rank of these honoured associates and friends. During the years which Charles Crompton spent at the

University, his holidays were always passed at home, where, in a happy, congenial, and affectionate family circle, the time went happily and too quickly by. The derivation of many amiable qualities of his mind has been traced already; it is now necessary to speak of one propensity not amiable—the indulgence of a satirical vein, which may perhaps have been inherited, or acquired by early imitation. Originality, humour, wit, and cleverness were found both in the elder and younger members of the family. Eton House, the residence of Dr. Crompton, was famous for unbounded hospitality. The Doctor often stood at the gate of his hospitable mansion, pressing his passing acquaintance to enter and partake of the refreshment which it might chance to afford. He enjoyed with extraordinary zest the society of persons who were different from the common pattern of mankind. He was a curious noticer of eccentricities, a nice judge of character, and loved to draw out by questions and remarks likely to elicit them any peculiarities of disposition or thought of which he knew or suspected the existence in those with whom he conversed. Something of malice is often supposed to be allied with the love of quizzing, but Dr. Crompton was more led to it by speculation and the love of mirth than by malice. He possessed naturally a satirical vein which often made him an ugly customer in political pugilism: his blows were not easily parried, and when planted they often told severely. He never spared one whom he deemed politically corrupt, and as he was a strong partisan, and prejudiced, many whom history now acquits of evil design fell under his suspicion, and underwent his castigation. Those who by groundless claims to superior sanctity—not evidenced by superior virtue—by narrowness, illiberality, or insincerity, justly incurred his displeasure, were the victims of a sharp pleasantry, which exposed and sometimes silenced them. Public wrongs and public wrongdoers, that is, those he so esteemed, seemed to him the fair subject of his public censure. Such attacks are in truth defensive when they are founded on justifying causes.

No politician is infallible; they in censuring their adversaries must judge according to their lights, and measure men by the standard they deem true. Dr. Crompton, who was eager and sincere in his advocacy of the rights of the people, then invaded largely by the operation of the corruptions which time and design conjointly introduce into the working of all forms of government, was slow to suppose the powerful opponents of his opinions, his opponents on conviction. Something of his habit of imputing bad motives to political adversaries was observable in Charles Crompton in his earlier days, but age and reflection softened the accusing spirit within him, though with a sort of filial piety he was late in admitting Canning to absolution. This venial shade of illiberality cannot be regarded by any one as a sign of a narrow mind, seeing how few at any time of life, whatever be their political or religious creed, ever become truly tolerant and catholic. The temporary errors of the leaders or members of a party in times of violent excitement are said to run with their creed; and exclusive claims to loyalty or to the love of freedom are loudly and unreasonably preferred, without reference to the limitations to which such feelings and predilections must be subjected—as times, races, climes, forms of government, knowledge, and virtue, various and varying, require. The true liberal is the man who possesses ever the liberal mind, and the truly loyal man is he who is loyal to the whole constitution under which he lives, not merely to some part of it; to its living, variable, and growing spirit, not merely to its letter. It is the letter which kills.

The Doctor's propensity to quiz passed by an easy transition into the mind of his son, but it seldom mingled itself there with any bitterness, and was but the indulgence of a playful mimic malice, which tickled rather than tortured his victims. Yet to hear him speak of his love of this sport, one who knew him but imperfectly might have supposed him a "laughing devil," an Asmodeus, unroofing men's houses to expose the faults and follies of the inmates. He exaggerated his

propensity to the dear delight of giving pain, and would invite a companion to the baiting ground—the robing room—with a laughing speech, “Come, let us go and torture old ——.”

*“Cela fait passer une heure ou deux.”*

Upon leaving the university, Charles Crompton entered the office of Mr. Denison, a solicitor at Liverpool. The Doctor had originally intended his son Charles for that branch of the profession of the law. By the advice of Mr. Denison his career was changed. That gentleman soon perceived in him signs of promise, and persuaded Dr. Crompton that his son would be likely to rise to eminence at the Bar. By Mr. Denison’s advice he was entered, in the year 1817, of the Middle Temple, and placed as a pupil in the chambers of Littledale, to be educated for the Bar. He was about twenty years of age when this auspicious change in his fortunes took place, which planted his foot on the first step of the ladder to the Bench. It was due to the discernment of a comparative stranger, and though parents are commonly accused of blindness to the faults of their offspring, they are as often apt to be blind in their judgment of their children to the signs of future eminence. The future thinker is pronounced dull, and the liveliest of the brood is the victim of much silly prediction.

Charles Crompton served under great masters in the then ascendant art of special pleading, in which he became himself a great proficient. No man ever rose to eminence in it—for we must distinguish between eminence and practice—who had not a clear head, and the capacity to become a correct thinker. After the elevation of his first master to the Bench, his next and last was Patteson, of whom he often spoke with affection as “dear old Pat.” Of his two masters he most resembled the first. In quickness and acuteness of intellect, in the rapid evolutions of his own thought, in readiness of resource, and in a certain subtle and over refining speculation, in hesitation, after chewing the cud of his opinions, about the soundness of his conclusions—doubts concerning them ordinarily shared by



no other mind—he bore a good resemblance to the celebrated lawyer whose chambers he entered in his first year of pupillage.

He might have said with old Selden, that “the proverbial assertion that the Lady Common Law must lye alone, never wrought with me.” So far from condemning the Lady Common Law to a cabin couch, he gave her one as ample as the great bed at Ware, and crowded it with companions. He was, in truth, an insatiate devourer of books. That he had read a great deal of law during his education for the Bar as a student was necessarily to be inferred from the large stores of legal learning which he possessed even in the first years of his practice. He used to say that he owed his knowledge of law to Williams’ *Saunders*. It was always a mystery to some of his associates in those early days of his forensic life what part of his day he devoted to law reading, whether from the morning or from the night he abstracted those “sex horas” which even Lord Coke deemed sufficient. On entering his room, which for disorder might have competed with the chamber of Dr. Orkborne in Madame d’Arblay’s then popular novel of “Camilla,” he would be found lolling on the hardest and most shining of all ancient black horse-hair sofas, reading some novel, play, newspaper, or magazine. He probably devoted his evenings to severer studies, or, as he was always a bad sleeper, the night may have been in part so consumed. He was at once the most rapid and the most retentive of readers. Dr. Johnson has been described as eviscerating a book. Charles Crompton sprang upon a book like a cheetah upon a young pig, seizing the prey by the throat, and sucking out its life’s blood in a moment. A very retentive memory may be either a blessing or a curse, according to the use made of it. Montaigne says that all old fools have good memories, but the judge was one of those to whom a good memory is a blessing; he possessed a copiousness, readiness, and aptness of quotation seldom surpassed. Some scholars are all quotation and no thought, but he was merciful: he used his stores discreetly. He had always ready at hand in due season some “half mad

thing of witty rhymes," or some saying, the aptness of the application of which revealed a man of wit. His reading was universal—books of science and philosophy, abstruse treatises, requiring close attention and deep thought, plays, novels, poetry, reviews, magazines, newspapers, and even street ballads found in him an eager reader, or listener; the veriest trash was better than no book at all; the dust-bin is not always all dust, and in Macaulay's hands, street lampoons and pasquinades subserve the muse of history. His passion for novels never abated; he read them all—good, bad, or indifferent; he was a laughing critic of Alfred Percy's law, as Henry Roscoe, in his "Westminster Hall," laughed at Miss Brunton's description of a *capias* in her novel of "Self Control." When he travelled the circuit as a judge, he would occasionally buy a novel at a railway station, read it after dinner, and rather than sit at *Nisi Prius* in suspense, finish it rapidly the next morning at breakfast, devouring its interesting pages whilst neglecting his dry toast, which, like the dinners of heroines, remained untasted on his plate. His reading flowed over, into, and enriched his talk without choking the spring, or destroying the originality of his mind. He never lost the quaintness and oddity which his natural humour gave him. He was seldom without a book; he carried a well-thumbed little pocket "Horace" constantly in his coat pocket. His reading in his earlier days lay by choice amongst those writers who have lashed the follies, weaknesses, and lighter vices of mankind. Rabelais was one of his favorite authors. He was well read in our best moralists and essayists, deeply read in the literature of the stage, and especially in our elder dramatists. He had many of the plays of Ben Jonson so imprinted on his memory, that he would be constantly finding likenesses between the "humours" of some of his contemporaries and those delineated by the poet, from whom he quoted as abundantly as most men quote from Shakespeare, the universal. The novels of Fielding, and especially the pages of "Jonathan Wild," furnished him with many an allusion, quotation, or apt illustration. The

scene where Jonathan Wild is turned adrift in the boat at sea, his cocking his hat and looking fierce, with his exclamation, "d — me, who's afraid!" till remembering that no one beheld him, he became again dejected; the parallel drawn of the greatness of Jonathan Wild with that of conquerors, Jonathan's maxims, especially the first—"Never to do more mischief to any one than the occasion required, since mischief was much too precious a thing to be wasted," were the subjects frequently of his praise; it was a book from which he frequently quoted. He would quote also much from "Martinus Scriblerus," and match one speculation which afforded him much mirth, viz., "Whether God loves a possible angel better than an actually existing fly," with some corresponding droll fancies, and ingenious wonderings. But he did not draw his fun from books alone; there was a fruitful spring of original humour within him; and when he mixed the waters of his own wit with those drawn from highest sources, there was no turbid mixture from his own flow to defile—

"The hallowed bowels of the silver Thames."

He did not love argumentation; he was somewhat impatient of a prepared train of argument; he would make a thrust, or deal a hard blow, and fly laughing off from the discussion, and not seldom thus end it by a jest which was in itself a convincing argument. Such he was, when in 1821 he joined the Northern Circuit. The boy is father of the man; his character was already formed, though it became more fully developed later in life, and grew to be also softened and refined. He did not change, but grew, and throughout life he wore no disguise. A Bench, whether episcopal or judicial, is a transformer sometimes, but he never assumed any quality which he had not, nor put off any that he had. *Sibi constitit.*

The Northern Circuit was at that time remarkably affluent in great lawyers; and in Brougham it possessed, besides, one great orator and great man. The class of men who are not destined to lead causes, but are doomed to draw, useful wheelers,

the forensic car to victory, the "pleader counsel," abounded at that time on the circuit. There seemed slight chance of an opening to a young barrister of this class joining a circuit which already possessed a Tindal, a Parke, a Starkie, an Alderson and a Patteson, with many others deserving a more particular mention. The increase of the number of judges from twelve to fifteen drew two away, Alderson and Patteson, at one stroke, and yet left no hiatus *valde deflendus*; successors were ready. Promotion had drawn away Tindal and Parke earlier. The ranks opened and were filled up, and in a short time Charles Crompton, known as an excellent lawyer and pleader, took his fit place, and kept it amongst the foremost and best of his many competitors at the Bar in that line of practice.

He went the Lancaster, Preston, and Liverpool sessions. He also attended the Chester assizes. The Lancaster sessions were chosen by him, and by a few other persons, not for any amount of business which was transacted there, nor for any opening to more important practice which they offered, but simply because, the attendance of counsel at them being small, a junior had an earlier prospect of employment. It is some gain to such an one to have an early start anywhere; he becomes, whilst a very young man, accustomed to the sound of his own voice, and acquires confidence. Diffidence pleases at that age, and is regarded rather as a promising sign, whilst, five years later, it meets with no sympathy. The business of the sessions was generally despatched in a few hours; the sessions were held in the Crown Court at Lancaster, and they looked, when contrasted with the assizes, rather like a flower garden in November; no beauties graced the bench, and no smiles beamed on the young wigged aspirants to fame. The audience consisted solely of those whom business drew to the spot. A rural constable, sober as yet, on very good terms with his prisoner; an over sands attorney or two wearing top boots and managing a pauper appeal; a smart Lancaster lawyer's clerk, the gaol officials, and half a score of witnesses—such was the formidable audience before which the future judge conducted

his first case. The business of the sessions was generally despatched in a few hours; it commonly consisted of a settlement appeal (a good sessions might afford two), of two or three criminal trials, and occasionally of an appeal against a conviction. The chairman, Mr. Hornby, had been formerly a member of the Northern Circuit. He represented for many years the borough of Preston in Parliament. He possessed a competent knowledge of law, and was besides a clever well-informed man of the world. His invariable good-temper and courtesy made him a great favourite with all who practised at those sessions, especially with the juniors, to whom he listened with a courteous and benign attention. The leader of the sessions, Fletcher Raincock, a provincial barrister of eminence at Liverpool, was a man so different from all other men, that he could not fail to attract the curious attention of one who, like Charles Crompton, was an observer and a judge of character. A high wrangler at Cambridge, a senior fellow of Pembroke College in that University, an excellent mathematician, a good classical scholar, a man of general and profound learning, whose powerful memory had enabled him to accumulate vast stores of knowledge, Raincock nevertheless did little, and turned his powers of mind, which were considerable, to little fruitful use. In waste or nonuse of power he lived a legal Porson. He was so singular, that Crompton once said of him, that as the human race had been said to have been formed of men, women, and Harveys, so Raincock was entitled to claim to be a genus in himself. Yet whilst he indulged in this pleasantry at the expense of his senior declining in power and practice, he spoke with the highest respect of that senior's vast knowledge, and high and honourable conduct throughout life, dwelling on his freedom from envy, gentlemanly mind, and dignified forbearance of complaint at the slights of fortune. Raincock had had a large practice at the Bar. Though he had a slight impediment in his speech and a troubled delivery, he was, when roused to exertion, often powerful as an advocate. Always full of good matter, and dexterous in his management of a case, his clients had certainly

no cause to complain of him; but he shared the common fate, and gave place to successful juniors. Sooner or later the young cock becomes master of the yard. In some moulting time the young chanticleer prevails. The old bird takes refuge in the roost, and crows no more; and a rising leader on a circuit sometimes drives his senior to the roost of the bench. At the close of the light business of the sessions, the Court adjourned to the King's Arms at Lancaster to discuss the *pièces de résistance*, with which the table groaned. The fiery port, not exactly ruby bright, more like a draught from the Styx, was sipped by servient lips. The landlord was the dominant power. All are born subject to tribute. To pay for nothing, or for worse than nothing, is the old custom of the world. Charon had a waterman's fare, and the headsman his fee. All must grind at some mill. Hope empties many a cash-box. The juniors paid their bills, and groaned. They cast their coin into the sea, and looked to get it back from the mouth of a fish. They were as one who whistles for a wind, prays to fortune, fees a lady's maid, sacrifices to false gods, advances to alchemists or coffee planters, buys shares in a bubble company or preferential debentures over a rolling stock. The womb of fortune is like that of a prolific cat, which bears all but one for the pond. The chairman presided, his croupier was the deputy clerk of the peace. The crier opened his session in another room. The senior magistrate sat on the right hand of the chairman; to preserve a due distribution of seats, the senior barrister sat at his left. The other magistrates and the barristers, pretty equally distributed, mingled at the table and represented the court and the eternal interests of justice. The junior barristers, generally mute in court, found little opening for speech at the dinner table; their chief talked for them, and not only for them, but for the whole world besides. His voice was heard above all voices, and suppressed all. If attention flagged, an admonition, sometimes not of the most gentle, recalled it. "Sir, pray favour me with your attention. I perceive you are not listening to me." Some

things he told good enough not to displease even on a tenth repetition, but who could endure repetitions ten times ten? Anecdote, epigram, pun, witticism, each one introducing another, like the tales in the "Arabian Nights," or those of the Tota Kahani, came jostling from his lips. The deviations in this slow voyage of narrative were many, but it never failed to reach its port, the one inevitable epigram. The course of the monopolylogue would run somewhat thus—

A dish of cherries on the table would introduce Lucullus, Pliny, Pliny the Elder, volcanoes, craters, a descent into hell, tortures, the rack, Bacon, Selden, Coke, Somers, "Old Dismal," Bettesworth, Swift, and end in the celebrities of the Northern Circuit, with anecdotes of Bozzy, Christian, Wallace, Lee, Wedderburne, Scott, Law, Cockell, and Topping, the quizzers and the quizzed of the olden time. He would tell how Professor Christian simply and pathetically once lamented at the circuit table his own hard fate who never had, as he confessed, a servant in his life that lived with him three months without thinking him a fool. Then would he repeat epigrammatic squibs, turning on the blessing of light withheld, and exhorting Christian to thankfulness that his household knew him not so long. Then would follow stories, many in number, of hoaxes practised upon Bozzy. Turning to the chairman, he would say, "Do you remember so and so?" "Oh! surely," the chairman would reply. "Do you remember his fondness for Ormskirk gingerbread, and Eccles cakes?" "Yes; very singular." "Do you remember my epigram on that subject?" "Not perfectly," would be the courteous answer, and then would follow "The Inevitable Epigram":—

"From famine to preserve the nation,  
Pharaoh, Joseph called, the Jew:  
Would it be wise, in such vexation,  
Joseph ——— to send for you?  
No. You'd devour whate'er is wash'd by Nile,  
Frog, mummy, hippopotamus, and crocodile,  
Yet still exclaim, still craving to be fed,  
Oh! that the pyramids were made of gingerbread!"

From this exhausting symposium, a walk on a summer evening, by the dark waters of the Lune was a pleasant relief. No one delighted more than Charles Crompton in natural scenery, nor had a more complete sense of enjoyment in a ramble over a wild mountain side or heath; he lived beneath the habitual sway of this passion in youth, in manhood, and in age. He panted for the vacation, when he might get to "the dear blue mountains." From the noisy revel of the circuit table he would lead to a ramble at York or Lancaster, by the river banks, the Ouse or Lune, streams as different as a Blue Book from a Bible, and open out many a pleasant view of "salt and sharpness," without one grain of ill-nature in the composition. To understand this propensity aright, and how a sharp tongue was found in one who owned a tender, loving, and affectionate heart, it is necessary to advert as well to the impressions made on his young mind in his father's house, and the imitative habits of youth, as to the license to joke which prevailed on his circuit, and the unrestrained freedom of that "chartered libertine" and demagogue in a court dress, a witty tongue. The freedom of fun, the right, liberty, and privilege of unrestrained trade in the art of ingeniously tormenting were subsequently recorded in a canon, framed by an Attorney-General of the circuit, one of its most polished wits, the late Leycester Adolphus. This canon enforced the due subordination of the claims of friendship to the paramount right of the circuit to be supplied with jests, and kept in a healthy state of fattening laughter. The canon ran thus: "Never sacrifice your friend to your joke, but remember that man is not your friend who would stand in the way of your joke." No canon, it must be confessed, was ever more scrupulously or more cheerfully observed. It fixed the faith of the followers of Momus. All young animals delight to practise mimic war. The young cattle in the pastures butt at each other in sport, before their horns have sprouted; young toothless puppies worry each other, and young cock chickens, without spurs, ruffle their neck feathers, and aim to become heelers. In like manner, and with no malicious intent, the



young men on the circuit slung at each other, and shot their arrows of sharp and stinging words. Even the gentle Henry Roscoe was not an inexperienced or unpractised archer at these meetings, a man of whom no one ever spoke an evil word, and whom it would have puzzled the devil himself, in person or by advocate, to accuse.

The practice of Charles Crompton at the Bar was something from the first. He was never wholly briefless, but his progress was not very rapid. It underwent some disheartening fluctuations, and was not for many years commensurate with his merits. The briefs came, like conservative administrations, at long intervals; and the hopes of the expectant sometimes sank low when the delivery ebbed, or visited other contiguous shores. He had, like many others, his hot and his cold fits of hope. His friends were always more sanguine than he, where his future fortunes were their theme. He never held a high opinion of himself; he doubted his own powers too much, and was easily discouraged; he was apt to ascribe it to some supposed dissatisfaction with himself, when his clients knocked less frequently at his door. He would at such seasons of dearth laughingly say, half in jest and half in earnest, "I suppose they have found me out;" then, after speaking despondingly of his prospects, he would humorously exaggerate the declining state of his fees, declaring that he had but seventy guineas in the world, which he had hid in an old stocking at home, and that he knew not what he should do when his bank stopped. These jocular forebodings of poverty, by one who never knew really adverse circumstances, were nothing more than humorous exaggerations of a temporary lull in business. Smiling all the while at his own impatience, he compared his feelings under neglect to those of the genie in the tale of the fisherman in the "Arabian Nights' Entertainments." In punishment of his rebellion against Solomon, the genie by the power of that monarch lay at the bottom of the sea imprisoned in a jar sealed with a talismanic seal, which the prisoner's art of necromancy was powerless to break. In the first century of his imprison-

ment, the genie promised to make his deliverer rich even after death; in the second, to open to him all the treasures of the earth; in the third, to make him a potent monarch, to be always with him in spirit, and to grant him every day three requests, of what nature soever they might be. At last, when no deliverer came, the genie, angry, or rather mad, threatened to kill whoever might deliver him, and to grant him only the choice of the manner of his death. "Too merciful by half," said Crompton, "the clemency of the genie is out of nature." His was always a most fertile imagination. Any laughable thing that occurred to him in his daily practice, any ridiculous or vexatious occurrence which fell under his observation, was moulded by him into conformity with some incident which his reading supplied; he would suppose the most strangely improbable scenes, put his actors, whom he impressed, into them, and dress up a narrative, his premises conceded—at once natural, humorous, and well told.

During his leisure time at the Bar, the future judge was not an unadmiring or inattentive observer of the practice of others. The great masters on the circuit supplied many a valuable lesson, and one or two occasionally furnished food for a jest. "Come," he would say, "let us have done with chattering, and see how Johnny Williams manages this defence;" then would he seat himself near that cautious counsel, and watch from a back row the skill displayed, marking the caution of the steps by which approach was made to a hazardous question, the skilful retreat from before the face of a dangerously hostile witness, the abstinence from damaging questions, and the art shown in gliding without pressure over the dangerous places. At that day a court of justice was like the Bridge of Life in the "Vision of Mirza," full of pitfalls; it was the time of variance, *sans* stint or salvation, and justice sat a *Reine fainéante*, like a constitutional monarch of the new version, reigning and not governing. A judge in the Crown Court was provided with a magnifying glass, and sometimes succeeded in detecting a letter ungartered, or without its points. A surgical introspection

into a diseased throat was less minute and searching than the comparison of a document with the record. Counsel could not speak for their clients in cases of felony; many a speech, however, was administered in questions, and the jury were obliged to listen to speeches dropped into their ears as the eggs of a fly into a fat maggot, or infused *stillatim*, as the drops of a common and less powerful narcotic. There were two classes of defenders of prisoners in those days—the counsel of many questions, and the counsel of few. More copious than cautious in their cross-examinations, the former were often ironically complimented on the assistance which they rendered to Jack Ketch, on their dexterity in throwing the lasso or fitting the halter. The Crown Court was their “rope-walk.” The leaders of the men of few questions were Coltman and Williams, both of whom were, in process of time, promoted to the Bench. Three drafts from the Manchester sessions were Scarlett, Williams, and Coltman. The quaintness of the remarks of Williams, his comical gestures, looks, and asides, his indignation when pressed to put dangerous questions, the force of his aside rebukes, the fire of his eye glaring like that of an angry eagle, and the damnatory denunciations when a question proved damaging, of the safety of which he had been strongly assured, mingled much amusement with the instruction which his management of a case conveyed. Scarlett, the first of advocates, was a teacher of a still higher school. Brougham, surpassing all in eloquence, and in some causes unapproached as an advocate, where scalding words, impassioned declamation, ridicule, or deep pathos were needed, was still in the general conduct of causes second to Scarlett. Though Brougham and Lyndhurst in general powers of mind and the higher range of intellect surpassed Scarlett, yet both, though great as advocates, were inferior to that consummate artist. The highest point of art, the concealment of his art, was his in so eminent a degree that common observers scarcely thought of him as the advocate. Partridge saw nothing in Garrick’s acting. Miss Edgeworth, with her usual sagacity, puts into

the mouth of her rather priggish young lawyer, Alfred Perry, the answer to Mademoiselle Clairon's question, "*De l'Art ! et que voudroit-on que j'eusse ? Etois-je Phédre, étois-je Andromaque ?*" She wanted art in that she could not hide her art. The description of Scarlett as the thirteenth jurymen talking the case over with his fellows, is a happy illustration of his ordinary manner. He seldom touched the feelings; yet he could, and did occasionally, rise to passionate declamation, and sustain the flight. Cresswell, in later years, was a successful, but he was seldom an eloquent, advocate. As a speaker he was generally languid and unimpassioned, yet two of the most stirring, effective, and successful addresses ever delivered to a jury on that circuit were made by him, each in a will cause, and in the same year; the first in *Perry v. Newton*, at the Carlisle assizes, and the other in *Talham v. Wright*, at an adjournment of the Lancaster assizes. In examining a witness in chief, no one, unless it was Gurney, equalled Scarlett. In cross-examination Scarlett was also great: not boisterous, loud, nor bullying, but keen, persevering, un baffled, holding to the scent, piercing, stringent, and severe. His face was never clouded; he seemed always unruffled, the ladies said "so good-natured," and never disconcerted. When the cause was in the throes, he would sit paring his nails with nonchalance, and wearing his smile of confidence before the jury. Williams was often impressive, but never eloquent. There was a quaintness, a certain epigrammatic terseness of expression in his speeches which often told with his audience. A young barrister had commenced his forensic career in a novel and rather dangerous manner by kicking an attorney who was opposed to him on an arbitration. The attorney insulted him, and receiving a kick on the breech, brought his action of assault and battery, which was tried at the ensuing Lancaster assizes. It was the sporting cause of the assize. Williams, who was for the defence, extracted by a dexterous cross-examination the cause of offence, an insulting speech, and concluded a very effective address for his client with these words—"An insult, a

kick, a farthing all the world over." The plaintiff obtained his farthing. The counsel for the plaintiff, gathering up his papers, gravely exclaimed as he left the court, "My client has got more kicks than halfpence,"—his only good thing. When Mr. Tracy Tupman, shutting his eyes, and firing at random, brought down by chance his bird, Old Wardle applauded, and judged he had been out before, evidently an old hand. The cowardly knight whose horse ran away with him into the thick of the fray was a hero by general acclamation. Men sometimes make these lucky hits; but the world is not long deceived. We should not call a swan a songster even though it were to glide off the pool of life with a dying shake and a graceful bend. When true eloquence is heard, and is heard but rarely from the same lips, be sure that the pent fire is suppressed. If a man is eloquent when he is deeply moved, why have his feelings been iced? The culture which dwarfs an oak is misused skill. Take the potted tree into the forest, place it by the giants there, and learn what man may do when he suppresses the gush of his heart and divorces himself from his mistress, nature. What torture and what waste go to the making of a dancing dog and an industrious flea! The sweet neglect beats the adulteries of art. Cultivation may be carried too far.

Under these masters Crompton studied. He was not designed by nature for an orator, and he did not struggle with nature. He became a cautious, safe junior; he examined a witness admirably. He acquired a habit of keeping watch over a witness, of observing his face and gestures, and he possessed a happy power of discerning where the witness was likely to stop. He kept his own mind and that of the witness steadily in hand, directing the attention of the latter to the main point on which his evidence was wanted, and letting his narrative flow out in its own way. His mind, singularly acute, penetrated quickly the intricacies of a case; he looked it through and through, and guessed from what was told what probably remained unsaid. His habits of caution made him

search again and again into the grounds of his own opinions and the steps of his arguments, as ready ever to suspect and detect a fallacy in them as in his opponent's reasoning. His habit of looking round a subject made him as able to cast his opponent's line of argument as his own, and prepared him to meet all objections. It furnished him with a versatility in argument like that of Follett. He could appropriate the expressions of his judges, conceive the workings of their minds, and accommodate his line of argument to unite with theirs. He stooped, by an apparent submission, to conquer. This habit, however, produced a certain degree of irresolution, and sometimes after silencing the doubts of others he suffered from a fresh insurrection of his own. He was conscious of this defect, which is one perhaps inseparable from the possession of a mind of great acuteness.

The time was now drawing nigh when after all fluctuations of fortune that uncertain jade submitted to bear him steadily on; the introduction of the new rules of pleading, and the removal of the assizes to Liverpool, contributed largely to the increase of his business. He married in the year 1832, but even after that time, after twelve years' practice at the Bar, he was not always confident of final success, and at one time, under a temporary decline in his business, he talked of settling as a provincial barrister at Liverpool. These uncertainties faded away soon after, before a steady and progressive increase of business. The Municipal Corporation Reform Act, which he had mastered and thoroughly understood, was one cause of an increase in his practice. That Act gave rise to considerable litigation. Cases of compensation for loss of office, and of disputed qualifications for electors to civil offices, frequently arose, and Charles Crompton was often consulted and employed in those stirring contests. The Act was not drawn so clearly that a meaning could be readily fixed upon certain of its clauses. On a consultation once with Sir William Follett, he, who had not read his brief, began by asking his junior if the case turned on the intelligible or unintelligible clauses of the Act. No one

knew better than Charles Crompton how to disentangle the knots of an Act of Parliament, and to seize hold of the right clue to its meaning; and when he had been once engaged in causes of this character, his retention of that kind of business was certain. He was engaged in the various proceedings to which the grant of a charter of incorporation to the borough of Manchester gave rise. His connection with Liverpool brought him early into notice there, as one whose opinion on a difficult commercial case could be safely acted on, and that connection led subsequently to London business of the same class. This introduction, however, was more gradual and slow than might have been expected. On the circuit, his business for a long time lay chiefly at Liverpool, and almost entirely in the West Derby List; but in the closing years of his practice at the Bar few important causes were tried at Liverpool in which he was not engaged, and in London he obtained a fair share of general business. His opinions were always sound, and such that his clients could at once act on them. They were designed for use, and not to show how learned a man had been consulted. He never halted between two views of a case, but however doubtful he declared the law to be, he directed some definite course of action. His chamber business was large; it consisted much of heavy pleadings and of opinions. His arguments at the Bar were learned and full: he was always ready to meet an objection, whether it proceeded from his opponent or the Bench. His mind was saturated with legal principles; he not only knew what had been decided, but the reasons given for the decision, and those on which it might perhaps be more safely grounded. He possessed a clear and powerful intellect, an intuitive perception of a fallacy, and a mind singularly well gifted with the power of reasoning. His management of the case of *Philips v. Huth & Co.*, 6 M. & W. 572, which turned on the true construction of the word "entrusted" in the 2nd sec. of 6 Geo. IV., c. 94, drew from Mr. Baron Parke, now Lord Wensleydale, the practical compliment of a repeated reference to Mr. Crompton's argument

as the basis of the decision, and paved the way for his introduction to the London commercial world.

He was for many years a legal reporter. He commenced reporting the decisions of the Court of Exchequer in the year 1830; he was at first associated with Mr. Jervis, afterwards Chief Justice of the Court of Common Pleas. The Reports were afterwards continued by Crompton and Meeson, to whom Henry Roscoe was joined. In the year 1836, Crompton's increasing business forced him to discontinue his labours as a reporter. He was counsel to the Board of Stamps and Taxes, and filled the office of tubman in the Exchequer. In 1851 he was made a Benchet of the Inner Temple, and in the same year he was appointed a Commissioner to inquire into the proceedings, practice, and jurisdiction of the Court of Chancery.

His career at the Bar marked him for the Bench. In the year 1852 he was appointed by Her Majesty, by the advice of the Lord Chancellor, Lord Truro, one of the judges of the Court of Queen's Bench. He had, as assessor of the Court of Passage at Liverpool, some experience of judicial duties. In that more remote and humbler sphere, he had gained the reputation of a good judge. He had succeeded in that court his brother-in-law Henry Roscoe, and had sat there for sixteen years. The Bar practicing there parted from him with regret; they congratulated him on his accession to the higher honour, and spoke with justice and due appreciation of his ability and courtesy. As a judge in *banc* he did not disappoint the high expectations formed of him. He was equal to his fame. He did not sit there merely as a living digest of law, to be consulted; his natural powers of mind were more useful even than his learning. He may be justly placed as a judge in *banc* on a level with the best judges of his time. He sat in a court, the Bench of which was throughout his judicial career well filled, useful to all, inferior to none, respected and beloved. His oral judgments were learned, accurate, full, and suggestive. Many of the judgments delivered by the court, after time taken for consideration, were composed by him. They



are fit to be consulted alike by the practitioner and the student. They are full and sound expositions of the law on the subjects with which they deal. They do not offend by diffuseness, and have no needless repetitions of matter which is found in the statement and arguments. The language is often terse, with something of epigrammatic point, the arguments of counsel are answered, and not merely met by reiteration of a dissentient opinion. They read as if he looked to his books for confirmation and not for discovery.

As a *Nisi Prius* judge he was not eminent. Though in many respects admirably qualified for the trial of causes, yet he failed to attain success as a *Nisi Prius* judge. An excellent lawyer, he seldom misdirected a jury. Very few new trials were granted for any misdirection or non-direction of his, or because of verdicts against his direction and the weight of evidence. Judging by these results alone one would be disposed to concede him a high place amongst *Nisi Prius* judges. Judging *à priori* from certain qualities of his mind, one might have been led to foretel failure in this difficult department of the business of a judge, in which some judges eminent in *Banco* had failed before him. The opinion of competent and not unfriendly critics is nearly unanimous that he was not successful as a *Nisi Prius* judge. It is difficult to assign a true cause for this want of success, and the one hereafter supposed has no claim to rank above conjecture. His knowledge, clearness of mental vision, directness of aim, quick demolishing powers over specious objections, insight into character, and anticipation of coming evidence which gave value to his exertions at the Bar, or weight to his opinion, he possessed still in full force. His powers of expression were adequate, and his power of dealing with facts not slight. His failure may, perhaps, be ascribed to an over solicitude to reach what is, perhaps, unattainable—the power to foresee and stop all future objections. A possible new trial was his danger in the distance. Every conceivable aspect of the case was presented to avoid its being said that this or that view had not

been brought to the attention of the jury. He became diffusive, cut out his charge into too many divisions, and perplexed his audience by too many alternative directions. Intelligent as jurors generally are in these days of higher civilization, still they are drawn from classes of men not commonly given to weigh and balance conflicting presumptions. If many slightly differing statements of facts hypothetically presented are laid before them from which to select one, they may miss the clue and lose themselves in the labyrinth. An over minute direction, however able and accurate the remarks with which it is accompanied may be, may become to them as distracting as one which proceeds from ignorance and confusion of thought; and thus a judge may seem to wander who is in truth only obstructed by his own too subtle and forecasting mind.

As a criminal judge, he was not what would be popularly called a good criminal judge. In a Crown court, at a county assize, before a mixed and, in a great degree, an unlettered audience, that judge generally inspires the most awe and commands the closest attention who personifies, as it were, the majesty of the law. As the rude men of old chose the tallest man for their king, so a judge six feet two in his stockings, with something of pomp of voice, something of imperiousness of front, with dignity of manner and grace of elocution, though with comparatively an unfurnished mind, would count in popular esteem above a Crompton. Yet if competent judges had regarded the solid working of the business of the criminal court before Mr. Justice Crompton, they would have found nothing to which to except, and ample matter for commendation. Defects of manner there certainly were—a nervousness not disguised, and a lack of dignity and repose; but the results were good. His sentences were equable, and were not regulated by feeling. He never flinched from imposing sentences of long imprisonment where merited. He had no field days of display. He inspired the jury with confidence, after their experience of him in a trial or two had led them to appreciate his earnestness, his wisdom, and his justice. He was not

wanting in dignity of mind. No one more grave or solemn than he on a capital trial, nor more sensible than he how slight is the claim man has to superiority above his fellows: how often the felon's dock holds one whose guilt is to be imputed to the world in which he lives. The parent deserves the rod as often as the child, planting the very vices which he scourges. He sat almost weighed down by a deep sense of responsibility, and not holding himself of a different nature from the poor criminals whom he tried. His feeling heart worked within him, and he grew nervous over his work. This betrayed itself in a certain occasional querulousness and caustic rebuke. He detested all claptrap and sensational accompaniment. On one occasion he observed, with some sharpness, that he was not accustomed to have murders opened like sensation novels,—a sharpness of rebuke rare with him, and which nothing but a nervous dread of appearing to bear too hard on the fallen would have drawn from him.

“ Perhaps something at that moment pressed him close,  
Else was he seldom bitter, or morose.”

Occasionally the old spirit would break out in a sarcasm, but his general behaviour to the Bar was correct, courteous, and kind.

After twelve years' service upon the Bench, his health began to decline. During the last year of his life, the state of his health caused serious anxiety to his friends. Up to that time he had endured much labour without appearing to be the worse for it. Although he had always suffered from a feeble digestion, yet he had escaped serious illness, and his wiry frame and power of supporting great bodily and mental fatigue, gave hopes that his life would be long in the land which God had given him. It pleased God to order it otherwise. The mandate went forth, he heard, worshipped, and bowed down before it. The approach of death did not terrify. It was not new to his contemplation. He discoursed upon his state of health and the disposition of his affairs with calmness,

and not without a characteristic mixture of pathos and pleasantry. He seemed to wish to light up sad faces even in the chamber of mortal sickness. As he detailed his sufferings, sick dreams, and wandering thoughts, with a humorous mixture of drollery, the doctors could scarcely avoid a smile, and there were gleams upon mournful faces. After some time of suffering, patiently endured, he died at his house in Hyde Park Square, London, on October 30, 1865, aged 68, and was buried at Willesden Church near London. The judges adjourned their courts to attend his funeral, and there was not one amongst those who knew him who did not mourn for "Dear Old Charley Crompton." He left behind a widow and seven children. There were eight children born to him, but one son of the marriage died young. In his domestic life he was eminently blessed. His wife and children deserved the vast love he bore them. Till his last illness his house was the house of pleasantness and peace, and vice and folly knew it was no place for them.

It would be a charming picture for one to paint whose hand were equal to the work, to describe him in his home, sportive, happy, and diffusing happiness : to note his intercourse with his sons, entering as a companion into their pursuits and thoughts—their friend, loved associate, and confidant : so infusing his wise and gentle counsel, that it went on its refreshing way to the heart at once. They drew to their father instinctively as to their true and best friend. Love cast out fear, and they wore no disguise before him. Masks were never worn in that house. The house was always the most cheery when the master was at home ; his very step had music in it to his wife, children, and servants. He loved to lead the conversation to some entertaining and improving subject : he was ready at all times for a game at romps with the young ones ; he had fun for the frolicsome, mirth for the cheerful, wisdom for the grave, and wit for the mercurial. Natural and at home with all, he was beloved by all who knew him. "Oh madam," said one of his old domestics to her mistress, once

when the master was away, "the house seems so dull without master." Open as day himself, he made all unconsciously sincere. His influence in his home was unbounded. To displease him was punishment enough. When away from home he wrote long letters to his children, even to the very young, full of merry jokes; he became as a little child to them, and taught them wisdom in play. The tenderness and gentleness of his nature developed themselves in his domestic life, and softened much of the old tendency to satire. He said once of himself "I grow *lenior et melior* I hope as I grow older." It was true, and so be it with all.

His life may be pronounced happy: he won enough of fame for a moderate mind. True to himself, he ran a consistent course: and was preserved from pride in the hour of his wealth. He owed nothing to patronage, something to nature, much to labour, and all to God. Original, various, plain, and natural, fine-grained under a rough bark, with a free tongue and a pure life, a sharp tongue and a tender heart, a man of feeling and a man of mirth, he lived loving much and beloved, and died regretful yet resigned, amidst tears which he sought to change into smiles, good without pretence, humble, hopeful, tender, and true.

LAWRENCE PEEL.

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## ART. II.—CRIMINAL PROCEDURE.

[AT the conclusion of the article upon Criminal Procedure in our last number, the forms of an indictment and of a criminal information in England, were set out in order that they might be compared with the forms of an indictment and of criminal letters in Scotland, and we much regret that pressure of other matter should have prevented the forms in both countries from appearing in the same number; we trust, however, that our readers will refer to our last number and compare

the English and Scotch forms, as we think that an ocular inspection of the two will go very far to convince them, that much simplification is expedient, and may well be made in the forms in use in Scotland. Two of the simplest and shortest forms out of a large number of forms with which we have been furnished have been selected. The form of criminal letters has been selected, because it contains the notice of the two courts, at which the defendant is summoned to appear under the provisions of the 16 & 17 Vict., c. 80, s. 35, which does not apply to the Superior Courts.—*ED. L. M. & R.*]

THE following is the form of an indictment in Scotland:—

“ Henry Rose, now or lately prisoner in the prison of Dundee, you are Indicted and Accused, at the instance of George Patton Esquire, Her Majesty’s Advocate for Her Majesty’s interest : That Albeit, by the laws of this and of every other well-governed realm, Bigamy is a crime of an heinous nature, and severely punishable : yet true it is and of verity, that you the said Henry Rose are guilty of the said crime, actor, or art and part : in so far as, you the said Henry Rose having, under the name of Hugh Henry Rose, on the

25th day of March 1853, [Friday

or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, within Saint James’ Church, in the parish of Norland, in the county of Middlesex, in England, been lawfully married, according to the rites and ceremonies of the Established Church of England, to Sarah Ann Harvey, now or lately residing with Mrs Sophia Gover or Harvey, a widow, her mother, in or near Pile Street, in the parish of Saint Mary Redcliffe, in the city of Bristol, in England, the marriage ceremony having been performed by the Reverend William Haywood Ibotson, then incumbent of the said church, and now or lately residing at Edwinstone Vicarage, near Ollerton, in the county of Notts, or Nottingham, in England, and you having thereafter lived and cohabited with the said Sarah Ann Harvey as your wife, and the said Sarah Ann Harvey being still alive, and the said marriage still subsisting, you the said Henry Rose did, on the

16th day of April 1866,

[Monday

or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, within Heathfield House, in or near Hawkhill, Dundee, then and now or lately occupied by the Reverend William Wilson, minister of Free Saint Paul's Church, Dundee, then and now or lately residing there, wickedly and feloniously enter into a matrimonial connection with Amelia or Emily Stiven or Stephens, a factory-worker, then and now or lately residing in or near Gray's Close, High Street, Dundee, the ceremony having been performed by the said Reverend William Wilson, and you did thereafter cohabit with the said Amelia or Emily Stiven or Stephens as your wife; and this, you did, well knowing that the said Sarah Ann Harvey your wife was still alive, and that your marriage with her still subsisted; And you the said Henry Rose having been apprehended and taken before John William Thompson, Esquire, sheriff-substitute of Forfarshire, did, in his presence at Dundee, on the

8th day of June, 1866,

emit and subscribe a declaration: Which declaration; as also a paper or document, bearing to be entitled on the back 'Extract from the Marriage Register of St. James' Church, parish of Norland,' or to be similarly entitled; As also a paper, bearing to be entitled on the back 'Certificate of Proclamation of Banns and Marriage of Henry Rose and Emily Stephens,' or to be similarly entitled; As also the register of marriages for the parish of Saint James, Norland, in the county of Middlesex, commencing on or about 3rd May 1846, and ending on or about 21st December 1862, being to be used in evidence against you the said Henry Rose at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Circuit-Court of Justiciary before which you are to be tried, that you may have an opportunity of seeing the same: All which, or part thereof, being found proven by the verdict of an assize, or admitted by the judicial confession of you the said Henry Rose, before the Lord Justice-General, Lord-Justice Clerk, and Lords Commissioners of Justiciary, in a Circuit-Court of Justiciary to be holden by them, or by any one or more of their number, within the burgh of Dundee, in the month of September, in this present year 1866, you the said Henry Rose ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

"JOHN MILLAR, A.D.

*"List of Witnesses.*

- "1. John William Thomson, esquire, sheriff-substitute of Forfarshire.
- "2. William Bishop Dunbar, now or lately assistant procurator-fiscal of Forfarshire.
- "3. William Macqueen, now or lately clerk to the sheriff-clerk of Forfarshire.
- "4. James Dow, now or lately sheriff criminal-officer in Dundee.
- "5. Sarah Ann Harvey or Rose, now or lately residing with Sophia Gover or Harvey, a widow, in or near Pile Street, in the parish of Saint Mary Redcliffe, in the city of Bristol, in England.\*

"JOHN MILLAR, A.D."

The following is the form of criminal letters in the Sheriffs' Court:—

"Frederick Lewis Maitland Heriot, Esquire, advocate, Sheriff of Forfarshire, to

messengers-at-arms and officers of said shire, executors hereof, conjunctly and severally, specially constituted, greeting; Whereas it is humbly meant and complained to me by John Boyd Baxter, procurator-fiscal of Forfarshire, for the public interest, upon and against Margaret Taggart, now or lately prisoner in the prison of Dundee: That albeit by the laws of this, and of every other well-governed realm, theft, especially when committed by means of housebreaking, is a crime of a heinous nature and severely punishable: Yet true it is and of verity, that the said Margaret Taggart is guilty of the said crime of theft, aggravated as aforesaid, actor or art and part: In so far as, on the

6th day of March, 1866, [Tuesday.

or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, the said Margaret Taggart did wickedly and feloniously break into and enter the house at Liff Road, Lochee, possessed by Ann O'Brien or McAvany, widow, residing there, by breaking a pane of glass in a window of said house, inserting her hand and unfastening a sneck or catch securing said window inside, raising the under sash of said window and going in thereat; and having thus, or otherwise to the

\* See Alison, P. C. L., 212.



prosecutor unknown, broken into and entered said house, the said Margaret Taggart did wickedly and feloniously steal, and theftously away-take therefrom,

A pair of blankets and

A piece of cloth, or part of a window blind,

the property or in the lawful possession of the said Ann O'Brien or McAvany : And the said Margaret Taggart having been apprehended and taken before George Ramsay Ogilvy, Esquire, Advocate, Sheriff-Substitute of Forfarshire, did, in his presence, at Dundee, on the

6th day of July, 1866,

emit a declaration, which was, in her presence, subscribed by the said George Ramsay Ogilvy, Esquire, she having declared she could not write: Which declaration; as also the stolen property above libelled, or part thereof, being to be used in evidence against the said Margaret Taggart, at her trial, will, for that purpose, be in due time lodged in the hands of the clerk of the Sheriff Court of Forfarshire, at Dundee (before which Court the said Margaret Taggart is to be tried), in order that she may have an opportunity of seeing the same: All which, or part thereof, being found proven by the judicial confession of the said Margaret Taggart, before me and my substitute, or either of us, in a criminal court to be held by us, or either of us, within the ordinary Sheriff Court Room of Dundee, upon the 1st day of August, 1866 years, for the first diet; or, being found proven by the judicial confession of the said Margaret Taggart, or by the verdict of an assize, before us, or either of us, in a criminal court to be held by us, or either of us, at the same place, and upon the 17th day of August, 1866 years, for the second diet, the said Margaret Taggart ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming. Herefore it is my will, and I command you that on sight hereof ye pass, and in Her Majesty's name and authority, and mine, lawfully summon, warn, and charge the said Margaret Taggart to compare personally before me, or any of my Substitutes, in a court to be holden by us, or any of us, at Dundee, upon the

1st day of August, 1866 years, (\*)

\* See the 16 & 17 Vict., c. 80, s. 35, as to the two days of appearance post.

in the hour of cause, at twelve o'clock noon, for the first diet; there to plead guilty or not guilty and to underlye the law for the crime above libelled; And also, if required, upon the

17th day of August, 1866 years, (\*)

for the second diet, at eleven o'clock forenoon, again to plead guilty or not guilty, and to underlye the law as aforesaid: As also, if required, for the said second diet alternately, that ye summon an assize hereto, being not fewer than the number of forty-five persons, together with such witnesses as best know the verity of the premises, whose names are hereto subjoined in a list, subscribed by or for the Complainer, personally, or at their dwelling-places, all to compare before me, or any of my Substitutes, time and place of said second diet of comparance, the said persons of inquest to pass upon the assize of the said Margaret Taggart, and the said witnesses to hear legal and soothfast witnessing, in so far as they know, or shall be asked at them, anent the said Margaret Taggart's guiltiness of the crime above libelled: Each assizer and witness under the pain of one hundred marks Scots: Farther, that ye deliver to the said Margaret Taggart if personally apprehended, and if not, that ye leave for her, at her dwelling-place, and also at the Market Cross of Forfar, the head burgh of the shire of Forfar, a full double of the foregoing libel, and of the list of witnesses hereto annexed, and of the list of said assize. According to justice: With certification, &c. Given at Dundee, the Twenty-third day of July, one thousand eight hundred and sixty-six years.

“(Signed)”

ALEX. MOFFAT,

“Dep. Sheriff Clerk.”

Then follows the list of the witnesses, and after them, the list of the assize for the trial of the prisoner, including both the special jurors and the common jurors, each described by his calling and place of abode.†

Writing in 1853 Sir A. Alison said, that in indictments, and criminal letters, the same minute and scrupulous accuracy is required which is exacted in an English prosecution; and many particulars must be added for the information of the

\* See the 16 & 17 Vict., c. 80, s. 35, as to the two days of appearance post.

† See Alison's P. C. L., 214.

prisoner, which are not essential in their practice. In particular, not only the specific offence itself charged, but the mode in which it was committed, must be set forth with scrupulous accuracy; the place where the crime was committed must be correctly described by its name, parish, and county; all articles to be used in evidence must be minutely and accurately described, and submitted to the inspection of the prisoner previous to his trial; and a list of witnesses must be annexed to the indictment, or criminal letters, containing an accurate description of every witness, by his name, profession, place of residence, parish, and county. The smallest error in any of these particulars excludes the prosecutor from that article or witness on the trial.\*

And the same learned author tells us that it is well known to all persons acquainted with the Scottish criminal practice, that a great proportion, probably more than a half, of the acquittals in their courts originate in these technical niceties which are unknown in the English practice.†

As in Scotland the prisoner is never confronted with the witnesses till the trial, and therefore is in ignorance of the precise evidence which they are coming to give, it was very reasonable that a more special description should be given of the manner in which it is alleged that the offence had been committed, than where the prisoner had been taken before a magistrate and the witnesses examined in his presence. And this fully accounts for and justifies this particularity of statement, as long as the witnesses are not examined in the presence of the prisoner when he is charged with the offence. And it is but fair to say that this practice forms a very favourable contrast to the ancient practice in England: for no doubt in early times in England the witnesses against a prisoner were not examined in his presence till the trial, and our indictments have never condescended to the particularity of those in Scotland; nay more, in most cases still a prosecutor may, if he think fit,

\* Alison, P. C. L., 19.

† Ibid, 22.

prefer a bill before the grand jury, without taking the accused before any magistrate. It is equally fair to add that Scotland has set us an excellent example, in giving the accused a copy of the indictment in every case, though, with the full knowledge the prisoner obtains with us of the charge when examined before the magistrate, we think he can rarely, if ever, suffer any inconvenience from the want of a copy of the indictment.

The most marked distinction between the Scottish and English indictments consists in the former being in the form of a syllogism, in which the major proposition states the crime charged either by its legal appellation, if it have one, or by a description of its nature; the minor alleges the defendant's guilt of the offence, and the facts which establish it; and the conclusion infers that he should be punished accordingly. And we learn that any error or omission, which vitiates the regular form of the syllogism, and breaks the coherence and dependence of its several parts upon each other, is a sufficient objection to the libel, and that is the case, even although the error is in an immaterial part, or in those words of style which have been consecrated by the custom and observance of past time.\*

A general reference in the major proposition to the laws of the realm is held to imply the whole of the common law, and such statutes as, by their antiquity and universal usage, have passed into the known and customary law of the realm; but where a statute has been passed in modern times, either creating or defining any new offence, or increasing the punishment of an old offence, or giving privileges to the prosecutor in conducting the proof, it is essential, if the pains of the statute are to be invoked, or the facilities of proof taken advantage of, not only that the statute be specially referred to, but the enacting words must be quoted correctly.†

The minor proposition alleges that the prisoner is guilty of

\* Alison, P. C. L., 220.

† Ibid, 228.

all or some of the offences described in the major, and there is no part in which greater nicety is sometimes required, or in which an error is attended with more fatal consequences.\* Where there are several prisoners, and more than one crime, or one degree of crime, alleged in the major proposition, it is necessary not merely to aver that each is guilty of the said crimes, or of one or other of them, but to specify which of the crimes each has been guilty of, without confounding him with the other.† It was but natural to expect that such a form of indictment should lead to many failures in practice, and failures, too, be it observed, wholly irrespective of the merits; but this has been especially the case where the offence has no recognised *nomen juris*, or legal name. In these cases, unless the prosecutor can so accurately frame his major proposition as to set forth what in all circumstances must amount to a crime, or matter of dittay, the court will not sustain the major; and, although the minor proposition sets forth in the clearest possible manner some offence, the court will not look at the minor in order to explain or interpret the major. We deem it quite unnecessary to adduce any of the very many instances which are reported where justice has been most clearly defeated by most miserable technicalities under this head.

In England, as far as our research backwards extends, we have seen no trace of this syllogistic form; but there appears to have been a practice in early times of reciting the statute which created the offence, and, in such a case, if the indictment concluded "against the form of the said statute," a material variance in the recital was fatal. But it has been settled for many ages that it is never necessary in any indictment to recite any public statute upon which it is founded, for the judges are bound, *ex officio*, to take notice of public Acts of Parliament, and where there are more than one by which the proceeding can be maintained, they will refer it to that which is most for the public advantage.‡ These reasons, however, do not appear to

\* Alison, P. C. L., 245.

† Ibid., 247.

‡ 1 Chitty, Cr. L. 276, and the numerous authorities there cited.

us to be sufficient; for the "charge must contain a certain description of the crime of which the defendant is accused," not merely in order that the court may know what sentence to pronounce, but "in order that the defendant may know what crime he is called upon to answer," and "the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty' upon the premises," and that "the defendant's conviction or acquittal may insure his subsequent protection should he be again questioned on the same ground."\* We should, therefore, rest our forms of indictment upon the much broader ground that every one is bound and presumed to know what the law is, and that when an indictment sets out a charge with sufficient distinctness and certainty to enable a person conversant with the law to perceive what the offence is, it is sufficient, for every one is presumed to know the law. Whether, however, we are right in this view or not, it is perfectly settled with us that no statement, either of the common or public statute law, is necessary in an indictment; and no such statement is ever now made,† and no instance has ever occurred that we are aware of in which any inconvenience has arisen from the omission; and we cannot doubt that it would be a great improvement if the statement in the major proposition in Scotland were rendered unnecessary.

In England, indictments founded upon statutes, or where the punishment of any common law offence has been altered by a statute, used always to conclude, "against the form of the statute," and if they did not, they were altogether bad in the former case, and the common law punishment could only be inflicted in the latter case; but now by the 14 & 15 Vict., c. 100, s. 24, "no indictment for any offence shall be held insufficient for want (*inter alia*) of a proper or formal conclusion."‡

In England the general rule has always been that it is

\* 1 Chitty, Cr. L. 169, and cases there cited.

† The parts of a private statute, on which an indictment may be founded, must be set out.—1 Chitty, Cr. L. 277.

‡ See *Reg. v. Holmes*, Dears, C. C., 207.

sufficient to state that an offence was committed on a specified day; the exception is where time is of the essence of the offence, as in burglary. In Scotland the time appears to be more particularly specified. So in England, from the highest offence to the lowest, it has always been unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material; and it is sufficient to prove that the offence was committed at any time before the finding of the bill by the grand jury.\* But in Scotland it is otherwise. Where, therefore, a woman was charged with a theft "late on the evening" of a certain day, and the proof was that the theft was between five and six o'clock, the Court held that this could not be considered as *late* in the evening, and, as the prosecutor had unnecessarily circumscribed himself in his libel, the offence, as specially laid, was found not proven.† So a variance in the year has been held fatal, and other similar cases have occurred.‡ The proper course would be to make the Scotch law the same as the English in this instance, by providing (as in the 14 & 15 Vict., c. 100, s. 24) that no indictment shall be insufficient "for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly," and by adding that "the particular time alleged need not be proved, unless time is of the essence of the offence."

With regard to the place where the offence was committed, it was formerly necessary in England to state a place in the indictment, whether the offence was local or not; and this seems still to be the case in Scotland. But now, by the 14 & 15 Vict., c. 100, s. 23, it is unnecessary in England to do so, unless the offence requires a local description; and this provision ought to be extended to Scotland. In England, on the trial of indictments for offences which are not local in their nature,

\* This rule is subject to the exception of cases where the prosecution is limited to a certain time after the offence.

† Hume App., 522.

‡ Escapes of Prisoners, 25.

it is generally sufficient to prove that the offence was committed at any place within the county; and it is immaterial if the proof show that it was committed at a different place in the county from that alleged. But in Scotland it is otherwise. A robbery was alleged "in the High Street of Edinburgh, near the head of the Fleshmarket Close;" but it was in fact within the mouth of the close, and in the first common stair there, and therefore the case failed.\* A woman was charged with giving poison to her child *in a close* in the Saltmarket; but the poison was in fact given *on the pavement* of the Saltmarket, and therefore the case failed.† And many similar cases have occurred.‡ It is clear that in this class of cases, where locality has nothing to do with the offence, the proof of the offence in any place within the county ought to be made sufficient in Scotland as it is in England.

Where the offence is local the place must be stated, and proved as stated in both countries. We confess we entertain a doubt whether in sound reason there is any ground why the particular place should be specified in certain offences. What difference in the essence of the offence is there between a burglary committed in the parish of A and one in the parish of B? And why should it not suffice to allege the house to be in the county without any further description? In some cases, as in indictments for the non-repair of highways, the particular description of the place is essential in order to show the liability of the parish indicted to repair.

In both countries it is necessary to describe the property, in respect of which any offence may have been committed, and the proof must agree with the description; but in Scotland the description appears to be more precise. Thus we find that a prisoner escaped because a parcel was described as "addressed to James Budge" instead of John Budge;§ and another, because a ram was described as "a three-year-old tup," and its age could not be proved.||

\* 2 Hume, 210.

† Alison's Practice, 262.

‡ Escapes of Prisoners, 26.

§ 2 Hume, 201.

|| Bell's Notes, 204.



In both countries the owners of any property mentioned in the indictment must be named, and the proof must support the statement. This rule in England formerly caused, and in Scotland still causes, numerous acquittals.

So, too, the rule is the same in both countries as to stating and proving the name of the person injured or killed.

We must here notice a case under this head, because it seems clear that the decision was erroneous. A man was indicted in Scotland for the murder of a woman described as the daughter of "John Robson, or Robertson, late *wright*," when in fact he was a tailor, and acquitted on the ground of this variance. He was again charged with the same murder in the same terms as before, with the single variation of the trade of the father; it was objected that he had already "*tholed an assize*" for the same act of murder; and the judges held that the objection was good, and that the prisoner could not be tried again.\* The ground upon which the first acquittal proceeded was that the word "*wright*" was material, and must be proved, and that as the father was proved to be a "*tailor*" that was a fatal variance. Now in England, before the 14 & 15 Vict., c. 100, s. 28, the prisoner must have pleaded that he had been previously acquitted of the offence alleged in the second indictment, and he must not only have set out the former indictment, but he must have alleged that every material fact in the one indictment was the same as that in the other.† In this case, therefore, the prisoner must have alleged that "*wright*" and "*tailor*" were the same thing, otherwise the plea would have been bad on the face of it; and as it is impossible that such an allegation could have been truly made or supported, it is clear that the decision was wrong. Again, it is settled that if a prisoner could have been legally convicted on one indictment

\* 2 Hume, 111, 195, 197, 446; Alison's P. C. L., 284.

† Where an acquittal takes place for want of proof of a name, and the prisoner is afterwards indicted, and a different name stated, he may aver that the person was as well known by the one name as by the other, and if the jury find that this is the case, he is entitled to succeed.

by any evidence that could have been adduced, his acquittal on that indictment may successfully be pleaded to a second indictment, and it is immaterial whether the proper evidence was adduced on the first trial or not. But, in this case, by no evidence that could be adduced could the prisoner have been convicted; for the father never was a wright. And it may well be laid down conversely that, if the actual facts be such that the indictment is false in any material particular, an acquittal upon it can never form a bar to an indictment which truly states the facts; and the reason is plain, viz., that the prisoner never was in peril on the first indictment, as no evidence could be adduced which would prove him guilty of the offence as therein charged. Indeed, it may be laid down as a *general* rule, that wherever a prisoner is acquitted on the ground of a variance between any material averment in the indictment and the evidence, he cannot defend himself from an indictment in the amended form by his former acquittal. This never has been doubted in England, and it was a very common course to send a new bill before the grand jury at once, with the necessary alteration, before the 14 & 15 Vict., c. 100, allowing amendments, rendered it unnecessary. The decision, therefore, was clearly erroneous.\* Mr. Dunbar is quite right in saying that "if there has been a mistake in any essential part of the libel the prisoner has not, strictly or logically speaking, undergone a trial, or been placed in peril for the precise crime committed by him. Why, therefore, should he be allowed to escape punishment if it is clear that he has committed a crime?"† And we cannot but hope that, if any such case should again occur, the Scotch judges will reconsider the subject; and, if they do, they will find that both according to reason and all the English authorities the previous Scotch decisions are erroneous.

In Scotland, as well as in England, numerous acquittals have

\* See 2 Russ, C. & M. 52, *et seq.*, for the English cases on this subject.

† Escapes of Prisoners, 32.

taken place on a variance between the manner in which an offence has been alleged to have been committed and the evidence in support of that allegation. We have always been of opinion that the logical mode of stating an offence was merely to allege that the prisoner did commit the offence, using apt terms for that purpose, but never stating the means by which the crime was effected; and this is the general course in all our common law offences, *e.g.* larceny, burglary, robbery, rape, assault, &c.; murder and manslaughter were exceptions; these exceptions, no doubt, arose from the statute of coroners requiring the specification of the wounds, &c.; the 14 & 15 Vict., c. 100, s. 4, rendered it unnecessary to state the mode of killing; and thus the indictments in these cases are now similar to the generality of indictments for common law offences, and this provision ought to be extended to Scotland.

The proper remedy for all the variances between the statements in indictments and the proof is to extend the power of amendment in the 14 & 15 Vict., c. 100, s. 1, to Scotland; and it would be well to adopt even more general words, so as to embrace every amendment, by which the prisoner could not be prejudiced in his defence upon the merits. The same power of adjourning the trial, and, if necessary for that purpose, of discharging the jury, ought also to be given to Scotland, in case any amendment should be made which might render such a course expedient.

In Scotland it is the practice to describe in the indictment articles and writings which are intended to be given in evidence on the trial; and they are lodged with the Clerk of the Court before the trial, in order that the prisoner's counsel may have an opportunity of seeing them. No such practice exists in England, and we can easily see that it might lead to great difficulties; and as it has never been suggested in England that it was expedient, we are altogether opposed to its introduction. In Scotland we think the practice might well be abolished, or at all events that the only part retained should be the deposit with the Clerk of the Court, and the inspection by the prisoner's

counsel, and that no objection should be allowable in respect of either. Such an alteration would prevent any such difficulties again arising as appear heretofore to have occurred.\*

Many cases have occurred in Scotland as well as in England where, after the jury had been sworn, a material witness has been absent; and a case is mentioned where a witness went out of the way on purpose;† other cases have occurred where a material witness has been too much intoxicated to be examined.‡ Mr. Dunbar suggests "that it is time our judges had the power, if they do not already possess it, of ordering an adjournment, or a new trial, in all such cases, so that justice may not be so scandalously defeated."§ Precisely similar cases have occurred in England on numberless occasions, and the ordinary course has been to direct an acquittal; as it has always been considered in late times that, when a prisoner is once given in charge to a jury, he is entitled to an acquittal, if for any cause whatever the prosecutor is not able to make out his case. There is no doubt, however, that the Court may adjourn the case to any time on the same day, and there seems to be no reason why the case may not be adjourned to any time during the same assizes or sessions; but, in cases of felony, the jury must be kept together if any evidence has been given. In our experience several cases have occurred where the prisoner has desired an adjournment, in order that his witnesses might be brought and examined. Two men were on trial for a capital offence before Patteson, J., many years ago, at Gloucester, and one made so clear a defence to the jury that it raised a strong presumption in his favour, and the witnesses he referred to were sent for from Stroud, the trial having been postponed for the purpose, and they proved an alibi so clearly that he was acquitted the same evening. A prisoner was afterwards tried before the same great and humane judge at Shrewsbury for murder, and the trial was postponed till a witness he mentioned was sent for, and in this case also an acquittal was the result the same evening. Such cases may well be followed on any

\* Escapes of Prisoners, 43.

† Shaw's Justiciary Cases, 238.

‡ Escapes of Prisoners, 18, 19.

§ Ibid., 19.

similar occasion; but, it is a widely different question, whether the prosecutor ought to be permitted to have any further time to make good his case. He ought to ascertain before the case is called on whether his witnesses are ready, and if for any cause a witness cannot be adduced, the proper course is to move to postpone the trial before the prisoner is given in charge to the jury. It was the practice in the worst times in England to discharge juries where the evidence did not suffice, in order that further evidence might be adduced. But this practice has long been discarded, as being in the highest degree unjust; and there can be no doubt that it ought never to be adopted for the mere purpose of enabling the prosecutor to come better prepared at a future time. There are, however, cases in which the ends of justice would seem to be best answered by discharging a jury. If a witness were spirited away, or drugged by the procuration of a prisoner, it is but reasonable that he should not take the benefit of his own wrong, and gain an acquittal; and the proper course would seem to be to discharge the jury, and it is conceived that the Court might under such circumstances discharge the jury. In *Reg. v. Charlaworth*,\* a witness, who refused to answer questions tending to convict the defendant, with the manifest intention of screening him, was committed, and the jury were discharged, as there was no hope for a conviction without his evidence. It has long been settled that the deposition of a witness, who has been kept away by the procuration of the prisoner, may be given in evidence against him on the trial, and this rests upon the same principle.

In England it has long been the common course, wherever it seemed expedient, to adjourn a trial till the next day, and this not only may, but ought to be done by the authority of the court without calling on the prisoner for any consent;† in cases of felony, however, the sheriff has to keep the jury

\* 1 B. & S., 460.

† 6 T. R. 530, note. In *Reg. v. Wm. Palmer*, the Bugeley poisoner, the trial began on Wednesday, May the 14th, and lasted till Tuesday afternoon, May 27, 1856. In *Reg. v. Stone*, 6 T. R. 530, Lord Kenyon, C. J., said that necessity justified what it compelled.

in some inn during the night. In Scotland it seems formerly to have been considered necessary that the trial should be concluded in a single sitting, however protracted; and until recently an adjournment has only been made when the prisoner consented to it; the jury being put under the charge of the Maces of the Court, no person being admitted to them, except the Clerk of Court, who might communicate to them on their private affairs. Recently, however, the court have, in several cases, without objection, adjourned the trial without the pannel's consent, and by reason of the necessity of the case alone.\* And there is every reason why this recent practice, which is consonant with the English practice, should be established for the future.

Several cases are mentioned in Scotland where a jurymen has separated himself from his fellows after the close of the case, and consequently no valid verdict could be given. Mr. Dunbar suggests that "to prevent failures of justice in such cases, it requires to be declared that where an irregularity in the assize takes place, through no fault of the prosecutor, and by which the prisoner has suffered no prejudice, a new trial should be ordered."† We, however, conceive that no such provision is necessary. A plea of *autrefois* acquit or convict, cannot be supported unless there was a verdict and judgment thereon, and wherever there is no verdict, or an imperfect verdict, the prisoner may be tried again.‡ In truth it requires a record perfectly good on the face of it to support a plea either of *autrefois* acquit or convict, and a record without a judgment is manifestly incomplete in the most material part. In England the point is settled. Where in a case of misdemeanour an adjournment was made till the next day, and the jury separated without the knowledge or consent of the defendant, it was held that this did not avoid the verdict, it not appearing that any improper communications had taken place with the jury, and the court said that in these cases the law has vested a

\* Escapes of Prisoners, 35.

† Ibid, 38.

‡ 2 Russ, C. & M., 60, 61.

discretion in the judge to allow the jury to go to their own homes during the necessary adjournment in each particular case.\* And where on a trial for felony the jury retired to consider their verdict, and one of them separated himself from his fellows, and had a conversation with a person who was not a jurymen concerning the trial and the verdict to be given, and a verdict of guilty was afterwards given, which the sessions set aside as erroneous, and ordered the prisoner to be tried at the next sessions, and he was then tried, convicted, and sentenced, the Court of King's Bench held that the judgment was right; for "the first verdict was either good or bad. If it were good, then the second trial was *coram non judice*, and may be considered as a nullity. If, on the other hand, the first verdict were bad, the prisoner might well be tried at the next sessions, and the second trial is not to be considered in the nature of a new trial, but the first trial is to be considered a mistrial, and therefore a nullity. In either case the judgment is right."†

In England juries almost invariably deliver *viva voce* verdicts, though they may give them in writing. In Scotland the Act 1587, cap. 29, required all verdicts to be in writing; but this led to so many escapes through defective verdicts that the law was altered partially by the 54 Geo. III., c. 67, and 6 Geo. IV., c. 22; and, lastly, by the 9 Geo. IV., c. 29, s. 15, written verdicts are to be discontinued in all cases where the verdicts are given before the court adjourns. Mr. Dunbar well observes, "It is difficult to discover a sufficient reason for any exception," and it certainly ought to be abolished.‡

In Scotland it seems to be at least doubtful whether a person, who has been examined as a witness for the Crown in a criminal case, can ever be indicted for the same offence as to which he was examined. This is very clearly wrong. There is no reason whatever why any such exemption from prosecution should exist as a general rule, and on the contrary the obvious tendency of such a rule must be to induce the

\* *Reg. v. Kinnear*, 2 B. & A., 462.

† *Reg. v. Fowler*, 4 B. & A., 273. ‡ *Escapes of Prisoners*, 41.

guilty to charge the innocent, in order to enable themselves to escape with impunity. In England the present law is clear that the fact that a witness has been examined in a criminal case affords him no legal bar against an indictment for the same offence. We well remember one Pugh being examined against a prisoner charged with the murder of one Carwardine, at Hereford, and he was himself tried, convicted, and executed at the next assizes for the murder. In this case the witness was not suspected of the murder at the time he was examined. But the most common case is where an acknowledged participator in the offence is admitted as a witness against his companions: this is done under an implied promise of pardon on condition of his making a full and true statement; and if such statement be made to the satisfaction of the Court, he has an equitable title to a recommendation to the mercy of the Crown; and in such a case in practice the accomplice is discharged without prosecution. But if the accomplice refuses to give full information, or tells a palpably false story, the Court will order him to be tried. Thus, where an accomplice, having made a full disclosure before the committing magistrate, refused to give any evidence before the grand jury, his name was ordered to be inserted in the indictment, and he was convicted on his own confession. So where an accomplice gave evidence against all his companions save one, who apparently was the leader of the gang, but refused to give any evidence tending to prove that he was present at the offence, he was ordered to be tried at the next assizes.\* This is clearly the proper mode of proceeding; for, whilst it gives an accomplice the full benefit of his having made a full and true disclosure, it prevents him from reaping any advantage from his being merely admitted as a witness, where he either refuses to disclose the truth or manifestly gives false evidence; and it seems quite clear that it is right that a similar practice should be introduced into Scotland.

\* See 3 Russ, C. & M., 598.



It is a rule of the Scotch, as well as of the English law, that no one shall be tried twice for the same offence. "The maxim," says Mr. Dunbar, "would be reasonable if it meant that no one should be *punished* twice for the same offence. No accused person can be called on to 'thole an assize' more than once. A prisoner is held to have tholed an assize, and to have been placed in legal peril, although the assize acquit him because of some technical slip not touching the merits of the case;" and he mentions a case where, in consequence of the copy of the list of witnesses not bearing the copy of the prosecutor's signature, it was held, after the assize was sworn, that no witness could be examined, and therefore the prisoner was found not guilty,\* and several other similar cases;† and observes "that, in the cases above cited, the prisoners were held to have tholed an assize by the jury having been simply sworn to try them. It was a mockery of justice to hold that such prisoners had been tried or put in peril, when not a syllable of evidence was led as to their guilt; and yet the jury were required, by the absurdity of the then existing practice, upon their oath to find the prisoners were not guilty." However, by an Act of Adjournal, in 1821, all objections founded on discrepancies between the record and service copies of criminal libels must be stated before the jury are sworn; and if the objection prevails, it is competent to desert the diet under the libel, in order that a new libel may be prepared. Such objections are seldom now made, because they cannot benefit the prisoner, unless they arise on criminal letters under the Act of 1701; in which case, where any such discrepancy occurs, a remedy is still beyond the prosecutor's power.‡ All these formal objections ought to be prohibited, or the defects made capable of amendment.

With regard to trials of prisoners before the Sheriff Courts in Scotland, the 16 & 17 Vict., c. 80, contains some admirable provisions. By sec. 35, a system of first and second diets was introduced; under it, the criminal libel is to be served on the

\* 2 Hume, 251.

† 2 Hume, 319.

‡ Escapes of Prisoners, 17.

accused five days at least before the first diet, at which the court is to call upon the accused to plead guilty or not guilty, and if he plead guilty he is to be immediately sentenced: but if he pleads not guilty the trial takes place at the second diet, which is at least nine days after the first. This system has worked excellently; indeed, Mr. Dunbar informs us that three-fourths of the prisoners plead guilty under it. It of course saves the trouble and expense of the attendance of the witnesses and jury in all cases, except those where a trial actually takes place. This is very satisfactory to us, for in our report on criminal procedure which was presented to both Houses of Parliament in 1856, we recommended that every criminal court should be empowered to arraign any prisoner upon the bill of indictment before it was sent before the grand jury, and if he pleaded guilty, to sentence him accordingly. We also suggested, that the Quarter Sessions might be adjourned from time to time to take pleas of prisoners, and to sentence them if they pleaded guilty, and in order to facilitate this course, we recommended that the depositions should at once be returned to the clerk of the peace in all cases over which the sessions had jurisdiction, so that an indictment might be prepared for each adjourned sessions. We also suggested that the assize courts might arraign all the prisoners on the first day of the assizes, and sentence those who pleaded guilty. In all cases when the prisoners pleaded guilty the witnesses should at once be countermanded. When the sessions were adjourned, there would be ample time to do this effectually, and in most assize cases it might be done if the pleas were taken on the commission day, as they might easily be, either by a Queen's counsel or serjeant, if a judge were prevented from attending; nor does there seem to us any reason why the quarter sessions might not be authorised to take the pleas in all assize cases except such as are capital, leaving the sentence to be passed at the assizes by the judge. With the practical experience of the benefit which has been found to arise in Scotland, there can be no doubt that the system ought to be at once adopted in both countries, and

extended to all criminal courts. In Scotland, the indictment or criminal letters would require no alteration; and in England it seems hardly worth while to alter the forms of indictment, especially as, in some cases, two or more prisoners may be charged in the same indictment, and all may not plead guilty. The indictment is not in fact the record (except during the same sessions), and when the record is drawn up, it is framed from all the entries and minutes of the Court. Where a prisoner pleaded guilty, the entry on the indictment might add to the present entry in such cases, "without grand jury," and the record, whenever required, might be drawn up by substituting for the words "the jurors &c., present," the words 'A. B. confesses', &c.

Since our article in last November, additional information has come to our hands respecting coroners' inquests, which so very strongly supports the views we have already expressed, that we must advert to it.

We will first give some information as to the effect of the 23 & 24 Vict., c. 116, in Derbyshire. By section 4 of that Act the coroners were to receive such an annual salary as was not less than the average amount of fees, mileage, and allowances actually received for the five years immediately preceding the 31st December, 1859. This salary might be agreed upon between the coroner and the justices in sessions, and if they could not agree, it was for the Secretary of State for the Home Department to fix the amount; and after the lapse of five years the salary might be revised.

This clause is very remarkable, for where it refers to the settling of the salary between the coroner and justices it only says "such salary as shall be agreed upon," "not being less than the average amount of the fees, mileage, and allowances actually received for the five preceding years;" but the Secretary of State is to have "regard to such average as aforesaid, *also* the average number of inquests held by any such coroner in the preceding five years, and *also to the special circumstances of each case, and the general scale of salaries of county coroners,*"

and when the salary is revised after the lapse of five years, the only thing that the justices are to regard is "the average number of inquests held by any such coroner in the five years immediately preceding," subject to "such appeal to the Home Secretary as before mentioned." Such a clause could not fail to give rise to all sorts of claims, and accordingly we learn by the report of a committee of justices in Derbyshire in 1861, that "each of the coroners claimed that, in addition to the average receipts for the five years preceding the 31st December, 1859, the salary should be increased by further allowances under all or some of the following heads, viz., 1. Increase of population; 2. Increase of information by the police; 3. Increase of collieries and ironworks, and consequently of accidents; 4. Adjourned inquests; 5. Additional fees in cases of murder and manslaughter; 6. Extent of districts; 7. Mileage: the railways not always affording the means of travelling to and from the place of holding inquests." The committee considered each of these claims, and decided against every one of them, and with reference to the increase of inquests, they observed that the attention of the court had frequently been called to the number of inquests alleged to have been unnecessarily held, and they give the following table, showing the gross number of inquests in each hundred, and the number of verdicts of "accidental death," and "visitation of God."

From this table it appears that the gross number of inquests held in the five years was 1,583; that the number of accidental deaths was 783, that the number of deaths by the visitation of God was 589, and that the number from these two causes together was 1,372; which deducted from 1,583 leaves 211 deaths from other causes; and, as the total number of verdicts of murder and manslaughter in the five years are stated to have been only 36, this leaves only 175 deaths from causes that are not stated. No other conclusion can be fairly drawn from these figures than that a very large portion of the inquests were unnecessarily holden. In the well-considered judgment of the Court of Queen's Bench, in *Reg. v. The Great Western*

*Railway Company*,\* Lord Denman, C. J., said, "If the verdict be death by the *visitation of God*, nothing more is done; *for in truth it appears that there was no occasion for an inquest.*"† *Primâ facie*, therefore, at least, wherever the verdict is "death by the visitation of God," the inquest ought not to have been holden; and it lies upon the coroner very clearly to satisfy the sessions that there was "reasonable suspicion of murder or manslaughter;" "for there ought to be a reasonable suspicion that the party came to his death by violent or unnatural means."‡

Hundred.	Total Number of Inquests for Five Years to Dec., 1859.	Number of those Inquests in which the Verdict was—
Morleston and Litchurch }	483	{ Accidental death..... 245 Visitation of God ..... 176 421
Repton and Gresley }	192	{ Accidental death..... 71 Visitation of God ..... 92 163
Appletree	78	{ Accidental death..... 84 Visitation of God ..... 83 67
High Peak	308	{ Accidental death ..... 128 Visitation of God .. ... 119 247
Scarsdale	527	{ Accidental death..... 305 Visitation of God ..... 169 474

\* 3 Q. B. 333.

† See *Res v. Kent* 11 East R., 299; and *Reg. v. Gloucestershire*, 7 E. & B. 805, where there were like verdicts; and the court held that the justices were warranted in refusing the costs of the inquest.

‡ *Reg. v. The Great Western R. Co.*, *supra* per Lord Denman, C. J. In this judgment the 2 & 3 Ed. VI., c. 24, s. 2 (which, where any person

It may, therefore, safely be concluded that at least 500 of the 589 inquests where a verdict of death by the visitation of God was returned ought not to have been held. Of course this remark applies to all verdicts which found the death to have arisen from natural causes, whatever were the terms of the verdict. In the cases of verdicts of accidental death, we are not warranted in inferring that so large a proportion was unnecessary; as undoubtedly juries very often return such a verdict, where the case is clearly one of manslaughter: but we cannot doubt that a third of these 783 inquests was unnecessary. If then we add this third—261—to the 500 from the 589 deaths by the visitation of God, we shall have 761 inquests to be deducted from the total of 1,583, which will leave 822; and the result is that nearly one-half the inquests were unnecessarily held.

Another remarkable feature in these inquests is the small proportion which the verdicts of murder and manslaughter bear to the number of inquests. The total of these verdicts was only 36, and the proportion they bear to the 1,583 inquests is 1 in every 44 inquests nearly. It is still more remarkable to notice how much this proportion varies in the different hundreds; in Morleston and Litchurch there were 12 in 483, or 1 in 40; in Repton and Gresley 1 in 192; in Appletree 1 in

is *feloniously* stricken or poisoned in one county, and dies in another, makes an inquisition of a coroner taken where the death happened valid), was much relied upon to show that the coroner's jurisdiction applied only to cases of felony, and it was observed that "the Act seems to assume the existence of the felony; for it makes good an indictment found for feloniously striking or poisoning, but is silent entirely as to what is to be done by coroner or jury if no such indictment be found;" and the court seem to have been very clear that at all events there must be some reasonable suspicion of manslaughter or murder to warrant the holding of an inquest. It is very remarkable that this case was not cited either in *Reg. v. Gloucestershire*, 7 E. & B. 805, or in *Reg. v. Carmarthenshire*, 10 Q. B., 796. It is equally remarkable that neither the court nor the counsel in *Reg. v. The Great Western R. Co.* were aware that the 2 & 3 Edw. VI. c. 24, had been wholly repealed by the 7 Geo. IV., c. 64, s. 32. It would seem, however, that the decision in that case would have been the same as it was; under sec. 12 of the latter statute; as that in terms only applies to any *felony* or misdemeanour begun in one county and completed in another.

78; in High Peak 2 in 303, or 1 in 151; and in Scarsdale 20 in 527, or 1 in 26. So that the average is the greatest in the hundred where the largest number of inquests were held. We cannot pretend to offer any solution for these discrepancies.

Five years having expired since the coroners' salaries were fixed, they again applied to the sessions for Derbyshire for an advance in their salaries, and the committee to whom the matter was referred, reported that, acting under the authority of *Reg. v. Gloucestershire*\*—"We have very carefully examined the statement of the coroners, and the verdicts returned lead us to the conclusion that many of those inquests were held where 'there was no reasonable ground to suspect that the death was not a natural death,' and therefore, as decided by the Court of Queen's Bench, not properly held. Some of the instances we allude to are those of deaths, the causes of which are stated in the inquisitions to be ague, apoplexy, asthma, bronchitis, congestion of brain, congestion of lungs, consumption, decay of nature, diarrhoea, general debility, diphtheria, dropsy, excessive drinking, heart disease, low fever, natural causes, typhus fever, visitation of God." And in a letter from the committee, which was read at the last October Sessions, they state that the following are some of these cases.

"Mr. Bennett—Disease of the heart, 28; visitation of God, 4; natural causes, 56; decay of nature, 1; convulsions, 7; apoplexy 11; total, 107.

"Mr. Busby—Disease of the heart, 58; natural causes, 4; decay of nature, 3; convulsions, 34; apoplexy, 25; total, 124.

"Mr. Sale—Disease of the heart, 20; visitation of God, 48; natural causes, 11; decay of nature, 1; convulsions, 22; apoplexy, 7; total, 109.

"Mr. Whiston—Disease of the heart, 71; natural causes, 6; decay of nature, 15; nervous depression, 2; convulsions, 46; apoplexy, 17; total, 157."

And the committee say that—

"All the coroners found their claims to an increase of salary upon

\* *Supra.*

the number of inquests actually held during the last five years, and the greater number which they say may be expected to be held during the next five years. But that is not the question raised. The question really is whether all those inquests were necessarily and properly held. None of the coroners allege that they were. We submit that they were not, for the reasons assigned in the Report above referred to, and as is shown by the under-mentioned table, and that if unnecessary inquests were not paid for they would not be held, and that the salaries proposed by us will be a sufficient compensation for all inquests legally and necessarily held.

“Deducting only half of these inquests as unnecessary, the receipts of the coroners would have been much less than their salaries; and we are satisfied that the continuance of their present salaries will, as we desire, abundantly remunerate them for all inquests properly held.”

We have now before us the table of the inquests referred to by the committee, which contains the number of inquests held by each coroner during the last five years, with the verdict in each case. The total number of inquests is 1,784; but one coroner made no return for one quarter, and if we add twenty-seven for that quarter, which will bring the number of inquests held by him for last year up to the number held in the previous year, we shall have 1,811 as the proper number for the five years. This number exceeds 1,583, the number for the previous five years, by 228; so that the number has increased one-seventh nearly in the last five years, an extraordinary increase in such a county as Derby; but whilst the number of inquests has increased, the number of verdicts of murder and manslaughter has decreased. In the former five years they were thirty-six; in the latter they are only twelve; so that in the latter period there is only one such verdict in 148 inquests, on an average. The verdicts, as given in the paper before us, are in many cases so uncertainly expressed, that it is very difficult to specify, with anything like the confidence we could wish, how many verdicts were really verdicts of natural, and how many of accidental deaths. Sundry verdicts are “suffocation,”



sundry "concussion of the brain," many "found dead," some "laudanum," "ulcerated wound," "fracture of neck," &c., &c. We therefore, give the numbers of deaths from natural causes and from accidents with great diffidence, and hope they are a fair approximation to the truth. The deaths from natural causes we give as 742, and from accidents as 847, making a total of 1,589; and if we suppose that of the 742 deaths from natural causes 500 were unnecessary, and one-third, or 282 of the accidental deaths were so also, we have 782 unnecessary inquests in the whole. We only wish that the table which lies before us were published; for we are convinced that no one could read it without being thoroughly convinced that a very large proportion of the inquests were wholly unnecessary. And it is quite clear that if coroners' inquests are to be continued, contrary to our very strong opinion, some measure ought to be taken to check the holding of unnecessary inquests.

In their report, the committee also say—"The coroners all assume that their salaries were not to be reduced below the rates they received prior to the statute 23 & 24 Vict. We see no evidence for this; on the contrary, we believe the statute was intended to check unnecessary inquests." We entirely concur in this view, indeed, the clause expressly empowers the justices at the end of five years "to revise, and thereby increase or *diminish* any such salary." Besides, before the statute, the coroners were paid so much for each inquest, and consequently the more inquests they held, the more money they received; this had a direct tendency to induce them to hold inquests in every case where any pretence for holding them existed; but in this, as in other cases, it was thought that if the coroners received a fixed remuneration irrespective of the amount of work that might be performed, there would be no inducement to hold any inquests unnecessarily; and, no doubt, this would have prevented unnecessary inquests if it had stood alone; but then, unfortunately, the provision that the salaries might be revised every five years, and fixed according to the number of inquests during the last five years, has a

directly contrary effect; and, if the payment for single inquests under the former state of the law was sufficient to induce the holding of unnecessary inquests, it is but reasonable to suppose that the present law offers a stronger inducement; for by holding unnecessary inquests during one five years, the coroner may obtain a permanent advance of his salary during all the next five years. It would be difficult to conceive any statute which has more completely failed in its operation.

The committee likewise observe that the words "average number of inquests held" in the 23 & 24 Vict., c. 116, s. 4, does not mean all inquests, but only inquests properly, that is not unnecessarily held. In this view also we entirely concur. At the time when this statute passed, it was clearly settled that the mere fact of a body lying dead did not give the coroner *jurisdiction*, nor even the circumstance that the death was accidental; but that, in order to give him *jurisdiction*, there ought to be reasonable suspicion that the party came to his death by violent or unnatural means; in other words, that there was reason to suspect that suicide, murder, or manslaughter had been committed.\* Now, an inquest holden without *jurisdiction* is, in contemplation of law, and in sound reason also, a mere nonentity; and nothing is better settled than that where a statute speaks of any matter, it means a lawful matter, and not a matter which is a mere nullity in law; unless, indeed, the contrary be expressed or necessarily implied from the language used. When, therefore, the 23 & 24 Vict., c. 116, s. 4., speaks of "inquests held," it clearly means inquests lawfully held, and not inquests held without *jurisdiction*. And the section itself plainly shows that this is so; for the salary the coroner is in future to receive is, "in lieu of the fees, mileage, and allowances, which, if this Act had not been passed, *he would have been entitled to receive.*" Now, he would not have been entitled to receive anything for inquests unnecessarily holden. Again, suppose in the five years before the 29th December,

\* *Reg. v. Great Western R. Co., supra.*

1859, the sessions had disallowed certain inquests, and the coroner had not been paid for holding them, it is clear that these could not have been taken into account by the sessions; for it is to be, "the average amount of fees, mileage, and allowances *actually received*," which excludes the fees, &c., and inquests disallowed. A contrary construction would lead to the absurdity that the coroner might unlawfully hold as many inquests as he liked, and increase his salary accordingly. Indeed, it is possible that a coroner might hold an inquest under such circumstances as would render him indictable, and if he were to take into account all the inquests held, whether rightly or wrongly, such an inquest must be included.

At the time when the Act passed, it was clearly settled that the sessions were the judges whether an inquest ought to have been held, and that that discretion, if fairly exercised, would not be overruled by the Court of Queen's Bench.\* It is quite plain that the 23 & 24 Vict., c. 116, has neither in terms deprived the sessions of this jurisdiction, nor vested it in any one else; and it is equally clear that the jurisdiction of the sessions over the coroner's accounts of expenses, under the 1 Vict., c. 68, s. 3, is still existing; and as these accounts are to be laid periodically before the sessions, and the coroner may be examined before them as to their correctness, they have then an opportunity of examining him as to the propriety of holding the inquest; and the question naturally presents itself, whether that is not the only time at which they can make such inquiry, and it would seem that much might be said in support of that being the only time. It is clear that it was the only time under the previously existing law; and it is certainly still the only time for examining the accounts under the 1 Vict., c. 68, and it is obviously the most convenient time, as at that time the facts must be fresh in the mind of the coroner. If under the old law the coroner's fees had been allowed at one sessions, they could not have been disallowed at a subsequent one, and,

\* *Reg. v. Gloucestershire, supra.*

if the sessions allow the coroner's accounts under the existing law, without questioning the propriety of the holding of the inquest, it may well be urged that, when at the end of five years, the coroner claims to include such inquests in his calculation, the sessions have no right to object on the ground that they were improperly held. The only answer we can suggest is, that that which in its beginning was an absolute nullity cannot have obtained any validity by lapse of time, *quod initio non valet, tractu temporis non convalescet*, and perhaps this might be held to be the correct legal view; still it would seem to be more prudent that the sessions should, when the coroner presents his accounts, invariably examine into the propriety of the holding all inquests where the verdicts are either accidental death, or death by the visitation of God, and if they find that they were unnecessarily held, that they should make an entry of that finding. This clearly would place them in the best position for meeting the future claim of the coroner in respect of such inquests, and it would probably tend to check the holding of such inquests.

And this leads us to a very important question. Where an inquest is unduly held, are the sessions bound to allow the fees and allowances which are directed to be paid by the 6 & 7 Wm. IV. c. 89, and 1 Vict. c. 68? This question has been twice before the Court of Queen's Bench. In *Reg. v. Carmarthenshire*,\* it was held that the coroner was not entitled to his fee of 6s. 8d., under the 1 Vict., c. 68, where the justices had held that the inquest was unnecessary, but that the allowances to medical men, &c., under the 6 & 7 Wm. IV. c. 89, and 1 Vict., c. 68, must be paid. This case was reviewed in *Reg. v. Gloucestershire*,† and the Court do not appear to have been satisfied with the decision; for they granted a mandamus as to the coroner's fee of 6s. 8d., in order that the question, not only as to that fee, but also as to the allowance of the disbursements under the 1 Vict., c. 68, might be solemnly

\* *Supra*.† *Ibid*.

argued.\* It is plain, therefore, that the Court considered that the question as to the disbursements (as well as the coroner's fee) was not finally settled, but still deserved to be solemnly argued. It does not appear, however, that this case was again brought before the Court, and therefore it may be well to say a few words upon the question. No one can read the 6 & 7 Wm. IV., c. 89, without seeing that it plainly applies only to inquests where there is a suspicion of foul play, and the cause of death is uncertain. Besides, it is perfectly obvious that in order to give the coroner authority to summon medical men, he himself must have *jurisdiction* to hold the inquest. If he has not, he has no more authority to issue a summons, than a magistrate has in a case where no information has been made. And this is made perfectly clear by sec. 6, for under it a medical man is liable to a penalty for neglecting to attend in pursuance of a summons from the coroner; now no one can doubt that it would be a good defence that the coroner had no *jurisdiction* to hold the inquest. The whole of the reasoning in the judgment of the Court in *Reg. v. Carmarthenshire†* proceeds upon the manifest fallacy that every one is bound to obey the mandate of a coroner, though he is acting without jurisdiction. Now it is perfectly clear that the acts of an officer who acts without *jurisdiction* are utterly void; in truth they are of no more validity for any purpose than if they were the acts of a person who was no officer at all. Suppose that a coroner held an inquest without *jurisdiction*, and that he summoned a surgeon, and ordered him to make a *post mortem* examination of the deceased, can any one doubt that the friends of the deceased might lawfully resist the surgeon, and that if any violence were inflicted on them by the surgeon, they might maintain an action against the surgeon and the coroner also, if the violence were inflicted in pursuance of his order? The case seems to be precisely like the case where a justice issued a warrant where he had no *jurisdiction*, and a constable acted under it, in

\* See the conclusion of the judgment of Crompton, J.

† 10 Q. B., 803, 804.

which case both would have been liable to an action before the 24 Geo. II., c. 24 s. 6, which exonerates the constable from liability if he delivers a copy of the warrant upon demand.\*

These points do not appear by the reports to have been sufficiently pressed upon the Court in either case; but they seem to us to go to the very root of the matter. The Court, in *Reg. v. Carmarthenshire*† notice that the 1 Vict., c. 68, has not the word "duly" in it, but, as we have already observed, the statutes which speak of inquests holden, clearly mean inquests *duly* holden. Thus the 3 Hen. VII. c. 1, which ordained "that a coroner have for his fee, upon every inquisition taken upon the view of the body slain 13s. 4d.," clearly only applied to inquests duly taken;‡ and therefore it appears to us that no stress ought to have been laid upon the absence of the word duly in the 1 Vict., c. 68. It is much to be regretted that the case of *Reg. v. Gloucestershire* was not again brought before the Court, as, if the matter had been fully discussed, we cannot help thinking that it would have been held that no payment could have been enforced either for the coroner's fees or for any disbursement where the inquest was improperly held; and as to any supposed hardship on medical men or others in disallowing their remuneration, there is on the other hand the hardship on the ratepayers of being obliged to pay for unnecessary inquests; and it may perhaps be that where a coroner summonses medical men, &c., in a case where he has no jurisdiction, he would be personally liable to them in an action.

We should think that the following cases must convince any one as to the uselessness and mischievous tendency of coroners' inquests in murder and manslaughter. A prisoner on being placed at the bar, asked how it was that he should have been brought there before being taken before a magistrate? Blackburn J., said he had before complained of persons being committed on the coroner's warrant without being examined before a magistrate. He did not think the prisoner should complain

\* See *Atkins v. Kilby*, 11 A. & E., 777.

† *Supra*,

‡ The 3 Hen. VII., c. 1, is wholly repealed by the 26 & 27 Vict., c. 125.

of it; because it would probably be more in his favour than against him. In charging the jury, his lordship again alluded to the fact of the prisoner not having been committed on a magistrate's warrant, as well as on a coroner's warrant; but said he had no power to punish such conduct except by disallowing the prosecutor's costs, which he should do.\*

So on an indictment for murder, where the circumstances were extremely suspicious, Lush J., in the course of the case, strongly commented on the fact that there had been no examinations of witnesses and sifting of evidence before the justices. There were only examinations of witnesses taken before the coroner in the loosest manner, and *the prisoner's statement was not admissible in evidence against her from the manner in which it had been taken.* If any further case of the kind came before him, and no depositions were taken before the magistrates, as in every case they ought to be, he should disallow the costs for the prosecution, as he saw had been done by Mr. J. Blackburn, at Manchester assizes the other day. The prisoner was acquitted.†

We cannot but express a hope that the question of coroners' inquests will be taken up by Parliament, and the matter well considered; and, if it be, we cannot doubt that we shall be freed from an institution, which, whatever may have been its use in ages that are gone by, is no longer fit for the present state of society.

We have learnt with much pleasure that our former article upon this subject has excited no inconsiderable interest in Scotland. This has induced us to go into much more detail as to the English procedure in this article than we otherwise should have done, in order that it may be duly appreciated in Scotland. Our only object is that the system of both countries should be fairly and candidly weighed, and that all advantageous proceedings should be adopted in both countries alike; so that while on the one hand, as few guilty persons may escape as

\* *Reg. v. Sherlock*, Manchester, Dec. 5, 1866; *Morning Post*, Dec. 6.

† *Reg. v. Jane Craggs*, Durham, Dec. 12; *The Times*, Dec. 14, 1866.

possible, so on the other, the innocent may be as rarely, and to as little extent as possible, subjected to any inconvenience. The further consideration of the subject has justified the opinion we formerly expressed of the practicability, as well as the expediency, of each system adopting some of the proceedings of the other, and we were happy to see that the late Lord Advocate was taking the matter into his consideration. We are strongly disposed to think that a commission to enquire into the procedure of both countries would be the most expedient course. At present, we regret to say, the procedure of the one kingdom is so little known in the other, that we are convinced that there would be great difficulty in properly framing any Act of Parliament for either kingdom, which would not perpetuate differences in the procedure that ought to be abolished. If, however, a few gentlemen practically conversant with the procedure of each were to meet and compare the procedure in the one kingdom with that in the other, point by point, we entertain no doubt that they would readily agree as to the greater number of points, and work out an assimilation in the law of both.

At present, Scotland really seems to stand even in a worse position than England did before Sir Robert Peel's Acts of the 7 Geo. IV., c. 64, & 7 & 8 Geo. IV., c. 28; and all the amendments contained in those Acts, and the very much larger and more useful amendments in the 14 & 15 Vict., c. 100, so far as may be practicable, ought under any circumstances to be extended to Scotland at once.

We have said nothing as to the procedure in Ireland, because we believe it to be very similar already to that in England. The 7 Geo. IV., c. 64 and the 7 & 8 Geo. IV., c. 28, were followed by very similar Acts relating to Ireland, in the 9 Geo. IV., and the 14 & 15 Vict., c. 100, applies to Ireland as well as to England. We can, therefore, conceive no reason why any difference should be permitted to exist in any other respect between the two countries; and we cannot but think that it would be very beneficial to have a similar procedure in all the three kingdoms.



### ART. III.—CASE OF THE BANDA AND KIRWEE BOOTY.

*(In the High Court of Admiralty.)*

WITH rare ability Dr. Lushington has in this case laid the foundation of a great system of military prize law, which may in after times take rank with the splendid jurisprudence of maritime warfare.

Military prize law is not very likely to involve the great doctrines of neutrality or other momentous international questions in the same degree as naval jurisprudence ; but questions will inevitably from time to time arise, which will require for their masterly solution, as in the Banda and Kirwee case, an exercise of all the powers and accomplishments of a consummate judge.

Our continental neighbours would style the Banda and Kirwee case a "*cause célèbre*," and it well deserves the appellation. The pecuniary stake at issue was enormous, it exceeded £700,000 sterling. The briefs of counsel, and the mass of books and papers which accompanied them were of extraordinary magnitude. The counsel for the different parties were thirty-six in number. The judge was the oldest judge on the Bench of Westminster Hall, where young men rarely occupy that elevated seat. The arguments extended through twenty-six days, and amply illustrated the high intellectual and legal attainments of such men as the then Attorney-General, Sir Roundell Palmer, Sir Robert Phillimore, the Queen's Advocate, the then Solicitor-General, Sir Robert Collier, Sir John Rolt, the present Attorney-General, Sir William Bovill, the present Lord Chief Justice of the Common Pleas, Mr. W. M. James, Vice-Chancellor of Lancaster, Sir John Karslake, the present Solicitor-General, Mr. John D. Coleridge,

Mr. Brett, Dr. Deane, Mr. Denman, and Mr. Mellish; and it is not too much to say that the forensic talent displayed on this occasion most honourably sustained the ancient fame of Westminster Hall, and produced corresponding effect upon the minds of those whose duties or interests obliged or induced them to attend the proceedings.

The booty in question arose, as is well known, from captures made in the year 1858, by a column of troops dispatched to the field, under the orders of General Sir George Whitlock, by the government of Madras, to take part in the suppression of the great military mutiny which was then raging in India. It is a question which has given rise to a controversy, but which does not here call for discussion, whether the commotions in India which led to the war of 1857-8, consisted only in military defection, or represented a national revolt of more extended scope. Mr. Kaye, in his history of the Sepoy War, appears to treat the case as one of a national character; but a full view of the controversy and of the facts which bear upon it, will be found very ably exhibited in the *Edinburgh Review* of 1856, in an article upon Mr. Kaye's work. So far, however, as the military operations of the British forces were concerned, and so far as the doctrines of prize law were affected, neither side of the controversy is in any way conducive to a right apprehension of the judicial proceedings which sprang from the captures of Banda and Kirwee.

For the purpose of restoring British rule and supremacy in Central India, several columns of troops were placed in the field. On the north-west, Lord Clyde took the personal command in Oude, but the operations which he conducted were unconnected with the questions in the Banda and Kirwee case. Sir Hugh Rose was at the head of the Central India field force, and Sir George Whitlock was appointed to the command of the Sangor and Nebudda field force, composed of troops equipped by the Presidency of Madras, for service in Bundelkund. The Doab, a narrow belt of territory lying at the south of Oude, between the rivers Ganges and Jumna, was allotted to a

small force under General Carthew, for the purpose of barring all communication between the revolted in Oude and Bundelkund, and he was assisted by another small force under General Maxwell. The fields of duty allotted to Sir Hugh Rose and Sir George Whitlock were contiguous—Central India, in which Sir Hugh Rose commanded, lying at the west of Sir George Whitlock's line of march—but communications were constantly maintained between those commanders, and each was thus kept well informed of the progress and plans of the other. Their respective lines of march also frequently converged, though their columns never came into actual junction or contact. The Madras division, while thus flanked by Sir Hugh Rose on the west, had on the east a small but effective force operating in the tributary territory of Rewah, under Major Osborne, while Sir Hugh Rose received great assistance on his own western flank, from a column under General Roberts, whose capture of Kotah was pronounced by Lord Clyde to be one of the most brilliant achievements of the war. There was thus a very close connection between the several divisions; but each, nevertheless, had its own distinct commanders, and all these commanders were co-ordinate. No orders were issued by any one of them to the others. In particular, General Whitlock, though he corresponded with Sir Hugh Rose, who was his senior officer, made no official reports to him, and received no orders from him. All the divisional commanders reported their progress either to the governments of the Presidencies to which they belonged, or to Lord Clyde's chief of the staff, an officer specially created for the occasion, who was in communication with all the commanders throughout the whole of their campaigns.

It was in the course of the campaign thus conducted, that Banda and Kirwee succumbed to Sir George Whitlock's column, and yielded the immense booty which gave rise to such important litigation between the several military divisions by whose collective energy and success the restoration of British supremacy in India had been effected. The mutual assistance

which each column, by its own success, incidentally afforded to the troops operating in the adjacent or neighbouring field, induced the claims of joint capture upon which the Court of Admiralty was required to adjudicate ; and the great value of the learned judge's decision consists in his luminous exposition of the fundamental principles of naval law with reference to joint or constructive captures at sea, and of the differing conditions which apply to military captures on shore.

It is perhaps not generally known or understood that the Banda and Kirwee booty was the first case of purely military prize which ever came under the adjudication of a regularly constituted legal tribunal in England. Since the discontinuance of the Court of the High Constable and Earl Marshal, neither the Court of Admiralty nor any other English court has an original cognizance of such matters, although the Court of Admiralty has frequently had occasion, incidentally, to consider military claims of title to prize in connection with captures made by conjoint expeditions of sea and land forces, as in the cases of the Cape of Good Hope, Naples, and Tarragona ; the naval elements in those cases conferring the jurisdiction. But unmixed terrene captures have heretofore been dealt with by the authority of the Crown alone ; and when the Government has resolved upon granting the booty to the troops, the ordinary course has been to make a public notification of the intentions of the Crown, and to issue a Treasury warrant for the distribution of the booty among the forces in whose favour the grant is made. The distribution then takes place according to an established and graduated scale which prevails in the army on such occasions. But the original intention of the Government with respect to the distribution of the Banda and Kirwee booty were so distasteful to the Madras army, who were the immediate captors, that the greatest resistance was made on their part to the Government scheme. The scheme first intimated by the Government included in the distribution the Bombay army under Sir Hugh Rose. It had so happened that the wonderful campaign of that officer, replete with battles and

prodigies of military enterprise, and abounding in glory, had been comparatively luckless in point of booty; in fact, no great prize had fallen to their lot, and Lord Palmerston sought to redress this inequality of fortune by allotting to them a portion of the booty which had been taken by the victors in another field of operations. But the Madras prize agents insisted so perseveringly upon the exclusive rights of actual captors, and obtained from time to time such discussions of the subject in Parliament, that the Government ultimately gave way, and announced the intention of the Crown to issue a royal commission of inquiry into the whole subject of army prize. Parliamentary discussion then ceased, and in February, 1864, the commission was issued; Lord Harrowby was the chairman; and the other commissioners were military officers of high distinction and large experience, viz.:—the Earl of Longford, Lord Frederick Paulet, Sir William Russell, and Sir Patrick Grant. They heard the evidence of official and other witnesses, and made their report in May, 1864, containing various recommendations for the future regulation of army prize. Among these recommendations were the following:—

“To give simplicity to all proceedings in matters of prize and facilitate despatch it is essential that the principle of actual capture should be as closely adhered to as the nature of military operations permits. Any departure from this principle involves doubt, uncertainty, dissatisfaction, and delay; and any apparent want of equity which may arise from it in particular cases will, we believe, be willingly acquiesced in by the parties concerned, as in the similar case of the navy, as one of the proverbial chances of war. . . . We are of opinion that the power of reference to the High Court of Admiralty, which is provided by the Act 3 & 4 Vict., c. 65, should as was the avowed intention of the framer (Lord Chancellor Cottenham), be called into action by the Treasury in all disputed cases.”

In accordance with the recommendation of the Army Prize Commissioners, a warrant of the Crown was soon afterwards issued, under which the Court of Admiralty took cognizance

of the Banda and Kirwee case. The jurisdiction of the court was derived exclusively from the Act of 3 & 4 Vict., c. 65, to which the commissioners referred; the section being as follows:—

“That the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please Her Majesty, her heirs and successors, by the advice of her and their privy council to refer to the judgment of the said court, and in all matters so referred the court shall proceed as in case of prize of war. And the judgment of the said court therein shall be binding upon all parties concerned.”

In naval cases, the first step of the captors is to proceed to condensation, in order to determine by the judgment of the Court of Admiralty, whether the captured ship is or not a good prize of war; the captors having only an imperfect title until a condemnation has been pronounced. The sentence of condemnation is therefore the title-deed of naval captors; and when a prize is condemned the proceeds are distributed in accordance with the standing proclamation issued by the Crown at the commencement of every naval war. But in the Banda and Kirwee case, the question of prize or no prize did not arise. The booty, like all other booty of war, vested in the Crown by the act of capture, according to the maxim, *Bello parta cedunt republicæ*; and the Court of Admiralty was not called upon, as in naval cases, either to condemn or to release. The Queen's warrant, under which the court assumed its jurisdiction, recognized the rights of the army to the benefit of the booty captured at Banda and Kirwee; and the only point for discussion was the rule or principle of distribution in connection with the services performed by the various columns which had been engaged in suppressing the rebellion. It was indisputable as a matter of fact, that the booty was reduced into possession by the Madras division of troops, under General Sir George Whitlock, which were organized under the title of the Samor and Nerbudda field force; and the prize agents of the Madras army were charged with the usual duties of

collecting and accounting for the booty. But the litigation arose, as has been already observed, from the desire of Lord Palmerston to apply the equitable theory of constructive capture in favour of Sir Hugh Rose and the Bombay army.

That theory has been long known and recognised in the Court of Admiralty, and is in constant application to cases of maritime capture. But it involves considerations and distinctions of great nicety, which have formed the theme of many of the most elaborate and remarkable judgments of Lord Stowell: and the result of the discussion in the Banda and Kirwee case showed that the Government scheme of distribution, though springing from the best intentions, was an attempt to stretch the theory beyond the limits of principle recognised by legal tribunals. The law officers of the Crown and other counsel had, long before the commencement of the litigation, given opinions which were practically in accordance with the ultimate decision of Dr. Lushington on the main question. But the Treasury, or rather Lord Palmerston, in the correspondence with the prize agents, maintained very strenuously that the captures of Banda and Kirwee were in strictness achieved by the joint exertions of several associated military corps acting in the same wide field, and were attributable to the combined execution of one common and extensive plan of strategical operations directed to one and the same end, wherever the troops might happen to be dispersed in the performance of their respective duties, and were therefore within the rule and principle of constructive capture. On the other hand, the prize agents of the Madras army contended that Sir Hugh Rose and his column took no part whatever by association, combination, or preconcert in the captures of Banda and Kirwee, or in the military operations immediately conducting to those events, and that the booty in question was the direct and exclusive fruit of the services of the Madras division under Sir George Whitlock. This was the issue to be determined in the cause. The Queen's warrant, which bore the date of the 10th June, 1864, purported to refer to the Court

of Admiralty the claims of all parties whomsoever to the property captured in the various operations mentioned in the warrant. In fact, the warrant in terms extended beyond the Banda and Kirwee booty, and included the booties captured at Jhansi, Calpee, and Gwalior by Sir Hugh Rose's force, and at Aliwall, Kotah, and Bunass, by the forces under Sir Henry Roberts. But the litigation was confined to the Banda and Kirwee booty alone.

The warrant first recites a proposal to the Crown that the captures at all the above-named places should be thrown into a common fund for distribution rateably among the three armies. It then mentions the exclusive claims of the prize agents of Sir George Whitlock's force, and next recites the claims preferred by Lord Clyde, Sir Hugh Rose, General Smith, and Colonel Middleton, and the forces under their respective commands to participate specifically in the Banda and Kirwee booty, and notices the possibility of other claims of the like nature. And all these matters are treated as the inducement to the issuing of the warrant. There was, however, a general understanding among the litigants that the application or distribution of the Banda and Kirwee booty was the only substantial question in the cause—the fact being that the other booties had all been appropriated or distributed among the various capturing armies without any wrangling upon the subject with other forces cotemporaneously in the field. So that, in point of fact, the Banda and Kirwee booty was the only fund in the hands of the Government awaiting the decision of the Court of Admiralty.

So soon as the Banda and Kirwee claims were referred to the Court of Admiralty, it became a question how the statutory directions for the treatment of such cases by that court upon a reference from the Crown were to be interpreted; and this question involved not only the forms or rules of procedure, but likewise the principles of adjudication between contending claimants. The Act directs that the court is to proceed as in case of "prize of war"—an expression which means a capture



made by a purely naval force acting under commission from the Admiralty of England. But in this case the preliminary proceedings of a prize cause, in regard to the proof of the hostile character of the ship or cargo and the claims of neutral owners and freighters, were wholly inapplicable: no sentence of condemnation being required. The principle of adjudication with reference to distribution was therefore the exclusive subject of argument; and the Banda and Kirwee booty having been by the royal grant already condemned, as it were, by the Crown for the benefit of the captors, the rules of naval prize law upon the subject of distribution necessarily became the subject of examination and argument, as furnishing a large supply of principles and precedents upon which it was convenient to rest the conflicting claims of the troops who took part in the litigation.

The rule of sight, as applied to captures at sea, was of course wholly inapplicable to the present case, as no troops other than the Madras division were alleged to have been moving with their faces towards Banda and Kirwee at the time when those places fell; and the capture of those places was not shown to be the result of any military operation undertaken with that specific object by the Madras army in combination with any other force. The evidence showed that the march to those places and the attacks and preparations for attack were executed solely by the Madras army in the regular course of their daily operations in the field; and it was not alleged by any of the contending claimants that the Madras field force received any direct assistance in reducing Banda and Kirwee to submission, or in capturing the booty which resulted from those services.

The Court of Admiralty was thus called upon to determine the validity or invalidity of this claim of joint-capture, and to enunciate the principle by which such a claim ought to be governed in cases of military booty.

Joint-capture, as is well known, has been long recognized, not only in naval cases, but in royal grants of military

booty; and the naval decisions furnish a large supply of principles which are equally applicable to maritime prize and to booty of war. But the diversity of the elements on which captures of prize and booty are made is alone sufficient to prevent the unlimited application of naval decisions to captures made on land. The captors by land as well as by sea, may be of two classes—actual captors and joint or constructive captors; and though the actual captors are *prima facie* easily defined, the class has always included persons who have taken no positive part in the capture. Part of a naval crew may, for instance, be casually absent from their ship; and a capture may be sometimes made by the tender or by the boats of a ship. In such cases, however, the entire crew shares the prize; and in this respect, the difference is not allowed to prevail which distinguishes ship from ship in combined naval operations. A ship has an organized crew united under one commander, and performing strictly associated duties; and where part of the crew is detached for purposes of duty, there is, according to Lord Stowell, no severance of a part, but rather the stretching out of a limb. In naval law, therefore, a capture is attributed to a ship and not to her crew or to any part of her crew.

The Banda and Kirwee case was, in point of form, brought before the Court of Admiralty by a petition of Sir George Whitlock and the officers and men under his command, as plaintiffs, praying the award of the entire booty to themselves. The several counter-claimants were defendants, and they filed answers containing the facts or grounds upon which they respectively relied in support of their respective cases.

At the opening of the cause, the plaintiffs claimed the right to begin. But this was overruled by the learned judge, who held that the plaintiffs as actual captors were *prima facie* entitled to the booty, and that it rested on the defendants to show cause, as in naval practice, why there should not be an order in favour of the plaintiffs.

It was incumbent, therefore, on the defendants to bring themselves within the principle of constructive assistance as

applicable to warfare on land. For none of the defendants were personally present or in sight, or capable of personally assisting at the fall of Banda and Kirwee, or in any preliminary combat; and none of them made any direct or conscious contribution of endeavour to those events, or were even moving with their faces towards Banda and Kirwee. They were all meritoriously and arduously employed elsewhere in operations occupying their immediate attention, and at distances which precluded any direct contribution of endeavour to the capture of Banda and Kirwee, though some of them were employed in parts bordering upon the field of duty assigned to Sir George Whitlock's column. But in the particular enterprise to which that force directed its exertions, and from which the booty in question resulted, they were not shown to have taken any direct part. Nor was there any allegation that they did. Their positions also at the times in question were such that they would have incurred no responsibility or discredit, if the days of Banda and Kirwee had been failures instead of successes. It was therefore only as constructive captors that the defendants asserted a right of participation; while the Madras Army confessedly fulfilled Lord Stowell's definition or-description of captors *de facto*, to whom Banda and Kirwee actually succumbed.

On the part of the plaintiffs, the actual captors, their first proposition therefore was, that their force was a particular separate and distinct column, denominated the Sangor and Nerbudda force, equipped and sent into the field under the exclusive command of Sir George Whitlock, by the government of Madras, and conducting its operations in its own distinct sphere of action, free from all military association and connection with any other military force whatsoever. And their second proposition was, that the booty in question was the direct fruit of the operations of this column alone, unassisted immediately or remotely by the actual or concerted presence or co-operation of any other military force whatsoever. The plaintiffs further contended that even supposing

them to have been in any sense associated with Sir Hugh Rose's division or with any of the other defendants, and the capture of Banda and Kirwee to have resulted from any consultation or pre-concerted scheme between Sir George Whitlock and other co-ordinate commanders ; yet that, by the rules of maritime prize law, as applicable to similar circumstances at sea, no right of participation accrues to naval forces serving under such other commanders who were not present at the scene of action or advancing to take part in the combat.

It could not be questioned that all the forces in the field during the Indian war of 1858, had similar general views. But the contention of the Madras Army was, that whatever they did was done separately and distinctly ; and that the captures of Banda and Kirwee were effected without any concert or communication whatsoever with the forces of Sir Hugh Rose or any other troops in the field.

In a popular sense, the Madras column and the forces under Sir Hugh Rose and the other commanders were doubtless engaged in what is called a common enterprize ; all having manifestly one common but general object in view, viz. : the extirpation of the rebellion and the restoration of the country to the control of the British authorities by the application of all military means within the power of the different commanders, whether acting under association or pre-concert, or independently of each other. And as the rules of naval prize-law were much invoked in aid of the claims to the Banda and Kirwee booty, some remarks of Lord Stowell in the case of the "*Vryheid*" (2 C. Rob. 28) are worthy of citation, to show that such general convergence of intention and purpose, even when referable to a common enterprise, is not enough to sustain a claim of joint-capture between naval forces.

A portion of his lordship's judgment in that case was delivered in the following terms :—

"Many cases might be stated in which ships so associated would not share. Suppose a case, that ships going out on the same enter-

prise, and using all their endeavours to effectuate their purpose, are separated by storm or otherwise, no one would contend that they should share in each other's captures. There is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing; it cannot be laid down to that extent, and indeed it would be extremely incommodious that it should. Nothing is more difficult than to say precisely where a common enterprise begins. In a more enlarged sense, the whole navy of England may be said to be contributing in the joint enterprise of annoying the enemy. In particular expeditions every service has its divisions and subdivisions; operations are to be begun and conducted at different places. In the attack of an island there may be different ports and different fortresses, and different ships of the enemy lying before them; it may be necessary to make the attack on the opposite side of the island, or to associate other neighbouring islands as objects of the same attack. The difficulty is to say where the joint enterprise actually begins. Again, is it every remote contribution given with intention or without intention that can be sufficient? I apprehend that is not to be maintained. An actual service may be done without intention, or there may be a general intention to assist, and yet no actual assistance given. Can anybody say that a mere intention to assist, without actual assistance, though acted upon with the most prompt activity, would in all cases be sufficient? If persons under such claims could share, there would be no end to dispute."

Some pertinent observations of Lord Stowell on the same subject will be found also in the case of the "*Dordrecht*" (2 C. Rob. 64), where land forces from the Cape of Good Hope under General Craig claimed to stand as joint captors of a Dutch squadron captured by Admiral Elphinstone in Saldanah Bay, in 1799. Co-operation was the ground of the claim; and the chief reliance of the army was on the intimidation (as evidenced by a letter of the Dutch admiral) produced on the Dutch fleet by the presence of the land forces, the advanced guard of which exchanged some shots with two Dutch frigates which lay nearest the shore. After stating that the case was not within the Prize Act as to conjoint expeditions, and was

not put forward as a case of concerted operations, and that the *onus probandi* lay with the army to show a co-operation on their part—"assisting to produce the surrender," which was made to the fleet alone—his lordship, addressing himself to the subject of co-operation between land and sea forces acting independently of each other, expressed himself in language which appears to be equally applicable to independent corps of land forces acting under distinct commanders.

"The mere presence, or being in sight of different parties of naval force is, with few exceptions, sufficient to entitle them to be joint captors, because they are always conceived to have that privity of purpose which may constitute a community of interests. But between land and sea forces acting independently of each other, and for different purposes, there can be no such privity presumed; and therefore to establish a claim of joint capture between them there must be a contribution of actual assistance, and the mere presence or being in sight will not be sufficient. I am strongly inclined to hold that when there is no pre-concert, it must not be a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service that will be deemed necessary to entitle an army to the benefit of joint capture. Where there is pre-concert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him; and whether that is important or not, it is not so material: the part is performed, and that is all that was expected. But where there is no such privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing of a slight aid, insignificant, perhaps, and not necessary, that will entitle another party to share. Suppose an engagement at sea, in which a part of the enemy's crews being disposed to fly to shore should be prevented from landing by an armed force, and should therefore be induced to surrender with the main fleet; or suppose this body of armed men on shore should have prevented the fleet from obtaining supplies two or three days previous to the action, these would be very remote services, and such as would not induce me to pronounce for a joint capture. The services which I should require must be such as were directly or

materially influencing the capture, so that the capture could not have been made without such assistance, or at least not certainly and without great hazard."

In another naval case of the "*Stella Del Norte*" (5 C. Rob. 349), a claim of joint capture was made by the fleet under Admiral Lord Keith, in respect of certain vessels captured by ships detached from his own squadron to act in concert with the Austrian forces on the coast of Genoa, for the purpose of driving the French forces out of that country. The captures were made by Her Majesty's ships "*Phaeton*," "*Mutine*," and "*Camelion*," coasting along shore in co-operation with the Austrian land forces, after the Austrians had driven away the garrison from a battery, under the protection of which the prizes had been lying. It was therefore successfully maintained in the prize court by the actual captors that they were a detached force, against whom the claim of joint capture preferred by Lord Keith, on the footing of association, was unsustainable.

"Suppose" (said Lord Stowell), "a Russian army landed in France, and supported, so far as it was capable of receiving assistance, by an English fleet upon the coast. Though a general purpose of concert and assistance might subsist between them, there would be many acts and many situations in which there could be no possibility of co-operation. If the army moved ever so little into the interior with a view of concentrating its force, or of taking a more advantageous position, any booty taken in such a course would be a capture, towards which scarcely any privity or communication of endeavour could subsist between the two forces in comparison with other cases of co-operation pointing to one particular and identical object.

"Mere intention or disposition to co-operate is manifestly, therefore, insufficient, even if such intention were founded on positive orders."

According to Lord Stowell, therefore, intention, even the most vigorous intention, pursued with undoubted activity, is not sufficient. There must be actually effective contributory

assistance; and it was therefore strenuously contended on the part of Sir George Whitlock's column, that to claim the benefit of co-operation, and, consequently, of constructive capture for troops, whose intentions were never for a moment directed by orders or otherwise to the specific captures of Banda and Kirwee, and who were at vast distances from the scene of action, would (in the language of Lord Stowell) introduce such a latitude of interpretation in the doctrine of constructive capture, as would make it impossible to set any bounds or limits within which army prize would be distributable; and that according to all moral doctrine and precedent the decisions of the greatest of all Admiralty judges were wholly incompatible with the claim of constructive capture preferred by Sir Hugh Rose and the other defendants.

The great name, however, of Sir William Grant, who presided at the Privy Council on the hearing of prize appeals from the Court of Admiralty, will justify a reference to the case of the "*Noudstein*" (1 Acton, 108), in which he thus expressed himself on the subject of constructive capture:—

"The sole question upon which this case must be decided, and which has therefore in the course of the argument been principally attended to, is, whether it is sufficient to establish a right to share on the part of asserted joint captors, that the capture shall take place during the time of a joint enterprise. Upon this we are decidedly of opinion that it is not sufficient that a joint enterprise shall exist at the time, except it expressly refer to the capture in question; or, in other words, that the capture grow out of the object for which the parties have been united, and be the joint produce of an actual co-operation and the object of union."

One argument against the exclusive claims of Sir George Whitlock's column was founded on the fact that at Kirwee the booty was surrendered without a previous combat. But this argument was overruled by Dr. Lushington, who, after remarking that the purpose of the Sovereign in ceding maritime prize to the takers may have been originally designed to reward successful valour, said naval captures were made under all



circumstances, and were as often the result of careful vigilance, or even fortuitous finding, as of actual combat, and that accordingly the system of granting prize to the takers was not limited, either in purpose or effect, to the primary object of rewarding valour, but might rather be regarded as providing a stimulus to activity, and a restraint upon pillage, with the further advantage of preserving property captured at sea intact, in order that if not duly captured it might be restored to neutral or friendly powers, and that, if rightly captured, the proceeds might be legally distributed among the takers. The learned judge likewise disclaimed *in limine* the right of awarding to any person a share in the booty on the ground of meritorious services, and ruled that he must decline to entertain the claims of any person but the actual captors on any grounds other than those of joint capture, however great might be his merit, however splendid his achievements, however severe his sufferings. Where association is proved, then, in the language of Lord Stowell, whether the part taken by a ship be important or not, the part is performed, and that is all that was expected; "Dordrecht" (2 C., Rob, 65). But association must be proved; and union under one and the same commander appears to be the true test of association, on which a claim to participate as a taker has been recognized in naval prize law.

It is not unimportant also to notice that the Court of Admiralty has never held community of enterprise to be evidence of association. Accidental junction without any specific direction from public authority for specific co-operation is not enough; as in such a case each ship acts separately under the direction of her own commander, though with a common object in view. And where there has been an original bond of official union, the discontinuance of the union, by detachment or otherwise, puts an end to any claim of joint capture. On this portion of naval prize law, the cases of "Le Niemen" (1 Dodson, 9), and the "Arthur" *ibid.*, 423, are instructive. Forces which are associated co-operate by original design, and are always deemed joint

captors ; but mere co-operation is accidental and is not necessarily attributable to association, with which it has been often confounded, though the support rendered on a particular occasion, may confer on the co-operating force the benefits of joint capture. The Court of Admiralty has also pronounced very strongly upon the degree of support derived from alleged co-operation, and no claim of this kind is ever entertained without proof of encouragement to the friend and intimidation to the foe. The rule of sight, therefore, which occupies so large a space in Admiralty decisions, is here brought into exercise; and it is treated as an axiom in jurisprudence, that in the absence of association neither the encouragement nor the intimidation above noticed can be afforded by a vessel which is out of sight. It is settled, also, that no claim of joint capture founded on sight can be available, unless the claimant is in sight both of the enemy and the actual captor during some part of the chase; but that condition being fulfilled, the claim will be received, as the Court of Admiralty always imputes to a man-of-war the *animus capiendi*; though that favourable presumption may itself be rebutted by proof that the claimant was on another tack, or was impeded by some other duty from assisting in the combat or chase; "The Galen" (2 Dodson, 24).

But the rule of sight is palpably inapplicable to military operations on shore, where the inequality of the surface of the land is alone sufficient to distinguish them from naval warfare; and in the argument of the Banda and Kirwee case, the rule of sight and the decisions to which it has given rise, found no place on either side of the contention. One naval case, however, was imported into the argument for the purpose of showing that remote co-operation, though of a definite character, is not sufficient to sustain a claim of joint capture at sea. This was the case cited by Lord Stowell (2 Rob. 22) of the "Mars," a French ship, captured off Port-au-Prince, by one of three unassociated British cruisers which had been apprised of the enemy's intention to escape from that harbour, and stationed themselves by arrangement at the three different outlets,

through one or other of which the enemy would be under the necessity of passing. The capture was accordingly made by one of the cruisers, and the other two, though not present at the capture, set up a claim to share in the prize as joint captors; but the claim was rejected by the Lords of Appeal, on the ground that there was no real co-operation between the three ships, and that the plan of arrangement between them amounted to a lottery in which the actual captor drew the prize of the winning station, where the combat was waged without the slightest assistance from the other two ships, which were not even within the range of sight; and Dr. Lushington described this as more properly a case of diversion than of co-operation.

After reviewing the naval decisions, the learned judge thus expressed himself:—

“The result of these prize decisions, so far as it is available for present purposes, seems to me to be as follows: They declare actual capture to be the rule, joint-capture the exception, admissible only in certain cases. They lay down the principle which underlies all cases of joint-capture, viz., encouragement to the friend, intimidation to the foe. They exhibit the two modes in which this principle operates—association and co-operation. Lastly, they enforce the necessity for the sake of the principle itself of assigning some limits to what shall constitute co-operation. But what shall be the limits in the case of booty captured on land, this they do not decide. The limits must be very different from those recognized in prize cases, just because warfare on land is so different from warfare at sea.

“Speaking generally, the surface of the sea is even and navigable, whilst the land has its mountains, valleys, rivers, bridges, forts, and towns, each of which has to be considered beforehand in the planning of the campaign. At sea, communication is not possible except by boats, and between vessels out of sight of one another is most precarious; on land, communication is usually practicable. Ships move swiftly, carry their own supplies, and are independent of one another; but an army advances comparatively slowly, and then not with safety, unless its flanks and rear have been to some extent secured. The destruction of the enemy's mercantile marine is frequently the sole

object of naval warfare; a campaign, on the contrary, is always systematic, is never carried on for the sake of booty. Prize consists of vessels afloat and the cargoes they carry, is essentially moveable therefore, and cruisers have to scour the sea in search of it; on the other hand, booty is for the most part stored up in towns and at other fixed points of military operations. The captor of a vessel has that for his prize and no other; but the defeat of a hostile army may place at the mercy of the conqueror a town 100 miles off, containing abundance of booty.

“These distinctions, and many others might be added, between captures on land and captures at sea, all lead to one result. They all tend to show that, in considering the basis of joint capture of booty, a wider application than that recognised in prize cases must be allowed to the term co-operation; because concerted action on a vaster scale than ever is feasible at sea is indispensable to a campaign, and because military operations, as compared with nautical, exercise an effectual influence over a far wider range both of space and time. Thus, the rule of sight which prevails at sea, is altogether inapplicable on land.”

The learned judge then proceeded to examine such precedents as could be found upon the subject of military booty, with reference to their bearing upon the Banda and Kirwee case, and evidence was thus afforded of a long course of usage, though the learned judge at the outset remarked, that the question what troops were to be considered as actually engaged in the capture or enterprise from which the prize-money arose, had been on each occasion specially determined by the Lords of the Treasury, under the guidance of the law officers of the Crown, but without any reference to a legal tribunal; and that, in truth, the Lords of the Treasury were bound by no law whatever in regulating the terms of the grant which they advised the Crown to sanction in cases of military booty.

The Egypt case, of 1801, was the earliest precedent; and it arose out of the captures made in that country by the British troops sent from England under Sir Ralph Abercrombie and the auxiliary force despatched under Sir David Baird from Bombay.

At the time when the battle of Alexandria was fought, at which Sir Ralph Abercrombie lost his life, and while his successor, General Hutchinson, was compelling the surrender of Rosetta and Cairo, Sir David and his division were still on the high seas, though they took part in the subsequent operations of the expedition. At the close of the campaign, the booty taken successively at Rosetta, Rhamanich, Cairo, Alexandria, and other places was granted by the Crown to Admiral Lord Keith and General Hutchinson, as trustees for the naval and military forces engaged in the expedition; and under this grant Sir David Baird's forces were allowed to share in common with the others, although the booty taken at Cairo was captured before Sir David landed in Egypt. It was contended, therefore, by the defendants in the Banda and Kirwee case, that the Egyptian booty was a case of constructive capture of a very cogent description; and Dr. Lushington allowed that the argument would have been valid if the Cairo booty had alone been the subject of the distribution, but that where several successive captures were made by the different portions of a combined force, it was not an unusual course to throw the whole into one mass, and distribute it by a single process amongst all who had been present on the occasion of any one or more of the captures, and more particularly where a multiplicity of distribution of small funds might lead to a result not substantially different. The exact amounts of the Egyptian captures were not in evidence. But tradition does not represent them as of any unusual magnitude.

The Waterloo case, of 1815, was a counterpart of the Egypt case, except that the distributable fund arose from a money-grant in lieu of booty. The grant was made to the army under the command of the Duke of Wellington engaged in the battles of the 15th, 16th, 17th, and 18th of June, 1815, or in the capture of Paris, or engaged in blockades and sieges in France, or which had joined the army before the 7th of July: and the money was not apportioned to each capture, but for the purposes of distribution the successive captures were treated as one.

It will be observed that the Egypt and Waterloo precedents were not strictly in favour of the claims of actual captors; and they were consequently much relied upon by the defendants in the Banda and Kirwee case.

The Mahratta booty, of 1803, was the earliest precedent on which the plaintiffs in the Banda and Kirwee case relied, as establishing the preferential rights of actual captors. The war extended over a vast expanse of country; and two armies were equipped and sent into the field—one from the north, under General Lake, the commander-in-chief of India, and the other from the south, under General Wellesley, whose forces were principally drawn from the Madras Presidency. General Wellesley would have been subject to the orders of General Lake if their forces had met; but they never did meet, and the two armies were always separated during their movements by a distance of many hundreds of miles. In the course of the operations, booty was captured by both armies, but of very unequal value, and the fruits of these captures were awarded to the actual captors alone. Neither army shared or claimed to share in the captures made by the other.

The Mahratta case, however, presented another feature, in which it peculiarly resembled the Banda and Kirwee case. General Wellesley's army consisted of two divisions—one under his own personal command, the other under the command of Colonel Stephenson; and these divisions operated sometimes conjointly, and at other times separately, but always to the north-east of Poonah. In addition to these divisions, which formed the Deccan army, there were other Madras forces stationed at Poonah; others at Hyderabad, 300 miles south-east of Poonah, under General Irton; and a third force at Moodghul, 150 miles south-west of Hyderabad, under General Campbell, who was senior to General Wellesley, and had instructions to aid him with detachments, as he did on two occasions. When, therefore, the booty taken by the Deccan army came to be distributed, General Campbell and General Irton asserted a claim of participation, but without success; and the exclusive

rights of the Deccan army were upheld by the royal grant. Those detachments, however, which had been supplied by General Campbell, and had actually joined General Wellesley before the captures, were admitted to share. On the other hand, the two divisions which composed the Deccan army under the respective commands of General Wellesley and Colonel Stevenson, were treated as one corps for the purposes of distribution, and as between those divisions the booty was made one common fund; the reason being, that notwithstanding the distinctness of the divisions, they had been combined in many of the operations which led directly to the captures, of which the Mahratta booty was the fruit.

The Deccan case came next under the review of Dr. Lushington; and as this case forms the first and only precedent of a grant of booty founded on judicial considerations, as they may be termed, it was deemed by the learned judge to be of the greatest importance for his own guidance in awarding the Banda and Kirwee booty.

The Marquis of Hastings being commander-in-chief in India, as well as governor-general, commenced hostilities in the year 1817 against the Pindarees, an assemblage of robber tribes who inhabited various parts of Central India; and the plan of operations was to invade their territories by two armies from the north and from the south. The Marquis took the command of the northern army, commonly called the grand army; and Sir Thomas Hislop, commander-in-chief at Madras, was (but not in that character) specially appointed to the command of the southern or Deccan army, consisting principally of Madras troops. The grand army had three divisions and a reserve, with a corps of observation under General Hardyman. The Madras army consisted of five divisions, with a reserve division; and a Bombay force in Guzerat was made subject to the orders of Sir Thomas Hislop, who was at the same time invested with extensive political powers; his command was also declared to be subject only to the authority of the governor-general, and eventually, in the conduct of

operations in the field, to the commander-in-chief in India. It appeared that frequent communications and orders of a military character, though generally signed by the secretary to the governor-general, passed from Lord Hastings to Sir Thomas Hislop. It was shown also from numerous official documents, that the closest association with a view to co-operation existed not only between the several divisions of the Deccan army, but between those corps and the Bengal divisions.

The capture of enormous booty resulted from the operations of the several divisions of the Deccan army in the course of their daily operations; and Lord Hastings, on the 9th December, 1817, directed that all booty captured from Pindarees should be allotted exclusively to the actual captors. But after the battle of Mahidpore, from which a vast amount of booty was supposed to have resulted, the theory of constructive capture was broached by a prize committee of the first and third divisions of the Deccan army; that committee having come to a resolution, that the foregoing direction of Lord Hastings as to the Pindaree booty, which was of no great amount, did not apply to the more important booty supposed to have been captured from the Mahratta powers; an unfounded notion being then prevalent, that the second division had at Nagpore, and that the third division had at Poona, made captures of booty to an enormous amount. The prize committee accordingly claimed that the Mahratta booty should be thrown into one mass, and distributed among the several divisions of the Deccan army, on the principle of association in the common enterprises of which the booty in question was the result. This view of the matter having been submitted to the consideration of Lord Hastings, his lordship, though he relinquished all claim on the part of himself and his staff to share in the Deccan booty, declined nevertheless to shut out by any premature declaration of opinion, the claims which the Bengal divisions which had taken part in the campaigns might think fit to put forward. But he avowed his preference for the general rule of



awarding booty to the divisions or detachments of divisions, by whose actual exertions the capture might have been effected. After long controversy a claim was eventually made on the part of Lord Hastings, to share as commander-in-chief in the whole of the Deccan prize-money; and similar claims on the footing of combination and general association in the operation which produced the captures were preferred by the several divisions of the Bengal army, and also by Sir W. K. Grant on behalf of his own division. The difficulty to which these conflicting claims gave rise was considered of so much importance in point of principle, that the Crown was for the first time induced to permit a legal argument upon the question of distribution; and accordingly, in January, 1823, the case was argued before a board of the Lords of the Treasury, assisted by the law officers of the Crown. The decision of the board was contained in an official minute, dated 5th February, 1823, by which it was declared that the doctrine of constructive capture could only be applied to that portion of the booty which was not positively captured in the field, but was realized at Massacks, Poona, and elsewhere, after the final cessation of hostilities; and to this extent, therefore, the claim of Lord Hastings, as commander-in-chief, was allowed.

But with respect to the whole of the booty taken in the daily operation of the troops of the Deccan army, a different rule was held to apply; and the booty thus derived at Mahidpore, Poona, and other places, was awarded exclusively to the capturing division of the Deccan army, though in the particular instance of Nagpore, General Hardyman and his division of the Bengal army, which had been specially despatched to take part in the enterprise against Nagpore, and had rendered direct co-operation in the reduction of that place, were held entitled to participate as actual captors in the Nagpore booty; the allowance of this claim of a Bengal division being considered as no departure from, but rather as a confirmation of, the general principle enunciated by the Lords of the Treasury. As the result of the foregoing decision of the

Board of Treasury, Sir T. Hislop received the share of commander-in-chief in all booty taken in the daily operations of the several divisions of the Deccan army, or by detachments of those divisions. And on the same principle, Lord Hastings, in his character of commander-in-chief of the Bengal army, and his staff, were excluded from participation in those captures.

The minute of the Lords of the Treasury embodying their decision in the Deccan case, is expressed in terms which were deemed so apposite to the circumstances of the Banda and Kirwee case, that they were, as a matter of course, much relied upon by Sir George Whitlock and his division in favour of their claim to be declared sole and exclusive captors; and Dr. Lushington cited this document in his judgment as an express authority in support of his own conclusions:—

“My Lords, having heard counsel in support of the claims of the Marquis of Hastings and the grand army, and those of Sir Thomas Hislop and the army of Deccan, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel, are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case will admit, to that of actual capture; and although they are aware that the principle of constructive capture must under certain circumstances in a degree be admitted, the disposition should be to limit rather than to extend that principle. They are therefore of opinion that the mode of distribution originally intended by the Marquis of Hastings would be most equitable and just with respect to the booty taken at Poonah, Mahidpore and Nagpore, and that the booty taken on each of these occasions respectively should belong to the divisions of the Deccan army engaged in the respective operations in which the same was captured, but that as the division of the Bengal army under Brigadier-General Hardyman appears to have been put in motion for the purpose of co-operating directing in the reduction of Nagpore, and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my lords to be justly entitled to share in the booty captured at

Nagpore, and that such other booty arising from the operations against the Mahrattas, in the years 1817 and 1818, as may now be subject to His Majesty's royal disposition, should be granted to such divisions of the grand army under the command of the Marquis of Hastings, and to the Deccan army under the command of Sir Thomas Hislop, as may respectively have captured the same, my lords are also of opinion that, conformably to the letter of the Marquis of Hastings to Sir Thomas Hislop, of the 12th of January, 1848, Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the Deccan until the said army of the Deccan was broken up on the 31st of March, 1818. My lords have felt it to be inconsistent with their duty to recommend to His Majesty to give his sanction to any agreement for the common division of booty into which the several divisions of either army may have entered, as it is their decided opinion that if the principle of actual capture be not adopted in this case as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution among the forces of all the Presidencies engaged in the combined operations of the campaign."

A Royal warrant was soon afterwards issued for the distribution of the Deccan booty, in accordance with the principle of the foregoing Treasury minute.

Dr. Lushington, therefore, pronounced that the Deccan case was a distinct assertion of the doctrine of actual capture. Not only was the grand army excluded from the booty taken by the Deccan army, but within the Deccan army itself each division had the exclusive benefit of its own captures. The principle was enforced as between army and army, and between division and division. But it was not applied as between detachment and detachment of the same division.

The learned judge next examined the Burmah booty cases of 1824, 1825, and 1826, which he considered irreconcilable with the Deccan case, and made observations to the same effect on the Scinde case of 1843. In all those cases the claims of

constructive captors had been allowed, on a footing which his lordship thought unsustainable. But with respect to the Moultan case of 1848, the learned judge thought that the claim of the Punjaub army to be admitted as joint captors was justly allowed on the ground of material co-operation. In the case of Delhi, Lucknow, and Dhar, in 1857, the rule of actual capture was again enforced in accordance with the decision in the Deccan case. His lordship, therefore, held that that rule as so enunciated, having been the result of a complete discussion of the subject, and as having been constantly referred to in subsequent cases of booty, must be taken as conclusive in deciding the Banda and Kirwee case, and more especially as the Royal Commissioners of 1864 had so strongly recommended an adherence to the same rule. But as the rule of actual capture, if pushed to the extreme limit, would involve the absurdity of including only the literal manucaptors of booty, with the prejudicial consequence of thereby encouraging lawless plunder, and, on the other hand, indiscriminate distribution would discourage personal efforts and render the shares insignificant, some line of demarcation, not too arbitrary, must necessarily be drawn; and the learned judge came to the conclusion that the true course was to draw the line between division and division. The analogy between a division and a ship of war was, of course, imperfect. But the divisional general and the commander of a ship were alike selected for their ability to manage a distinct force without the constant supervision of a superior; and a division, like a ship, was large enough for efficiency as a separate force, without being too large for the personal directions of one commander. His lordship, therefore, ruled, that as a just deduction from military precedents, a division was separately entitled to all booty captured by itself, and by its own detachments.

As regards association, also, the learned judge ruled that association, irrespective of co-operation by a positive contribution of service, was insufficient to support a claim of joint capture, notwithstanding the community of enterprise which

might subsist between several military divisions of troops ; and that association for the purposes of military prize-law must be association under the immediate command of the same commander—the pre-concerted and complex character of military operations, as compared with naval warfare, being such as to render no laxer association admissible as a title to participation in military booty. With two divisions under co-ordinate commanders, independent of each other, there could be no unity of enterprise, as in case of a junction in the field for unity of enterprise the senior officer takes the command of the entire force.

Then as to co-operation, the learned judge remarked that the naval rule of sight was wholly inapplicable to warfare on land, and overruled the argument that communication between divisions of an army was the equivalent of sight. Co-operation was an ambiguous term ; as in some sense every regiment and every soldier co-operates with every other in all parts of the world, and success in one country, or even the known existence of troops in that country, may be productive of encouragement to the friend and intimidation to the foe, wherever he may be. But no co-operation could justly be recognised unless it contributed directly to produce the capture in question. It might have well been that if Delhi or Lucknow had not succumbed to British troops, Sir Hugh Rose's achievements in Central India might never have been accomplished. But no one had ever contended that the forces under the command of Lord Clyde, on the north of the Ganges, ought to participate as joint captors in the booty taken by Sir Hugh Rose and General Whitlock. The language of Lord Stowell in the case of the "*Dordrecht*" (2 Rob. 64, 65, 71), to which reference has already been made, was then quoted by the learned judge, as indicating the true principle applicable to all cases involving the doctrine of co-operation.

Dr. Lushington thus concluded his most elaborate investigation of the principles of military prize-law ; and after entering into a long and lucid examination of the facts on which the

contending parties before him grounded their respective claims, the learned judge awarded the vast booty of Banda and Kirwee to the Madras division, under General Sir George Whitlock, subject only to the claims of Lord Clyde, as commander-in-chief, and of his lordship's staff attending him in the field.

Apart from all considerations of success or disappointment among the contending claimants, there was on all sides a generous acknowledgment of the masterly skill and ability with which the learned judge examined, disentangled, and reduced to comprehensible order the intricate mass of materials which created so large a demand upon judicial patience, industry, and discernment; and no claimant retired from the Court without the fullest conviction that the grounds of his claim had received from the learned judge his most attentive and impartial consideration.

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#### ART. IV. PUNISHMENT OF CRIMES OF VIOLENCE.

THE manner in which the penalties for crimes are meted out to the guilty, is a matter of the greatest social importance, inasmuch as there is a possibility of every individual being directly or indirectly affected by the process. And this being so, it is vitally necessary that the criminal classes should see by example the various degrees of turpitude which society attaches to their crimes. They should learn, if peace and safety are to be the portion of honest men, the stern and strong determination of the law to avenge outrages against the rights of citizens.

All writers of eminence rank these rights as springing imme-

diately or ultimately from safety of life, limb, and property. These rights stand in order as here written, and such order is the result of common sense. The protection of life and the soundness of limb are of infinitely more importance than the safety of any material property, however valuable.

Yet in these days a certain commercial tinge overcolours almost everything, and assuredly does so as regards the law. In a former article I alluded to the instances of this in the law of slander, and it will be seen that the same feeling affects the administration, though not the spirit, of the criminal law.

No person who studies the newspapers will have omitted to see the enormous disproportion between sentences in various courts for all classes of crimes. This is the first anomaly. The second is that of the reprehensible leniency with which so many offences against the person are punished, and the needless, and I might say absurd severity with which those against property are punished.

This second anomaly flourishes most in many magistrates' courts, those of stipendiary and unpaid magistracy equally. In a minor degree we find it at Quarter Sessions and sometimes even at the Assizes.

The peculiar class of cases which it is proposed to discuss in this article, comprises—1. Assaults generally. 2. Assaults on women. 3. Inflicting grievous bodily harm. 4. Manslaughter.

1. Assaults. That admirably drawn Act—one of a series of which may be said *O si sic omnia!*—the 24 & 25 Vict., cap. 100, has two sections relating to assaults. One of these, the 42nd, deals with “common assaults,” and fixes the punishment at a maximum penalty of £5 or two months' hard labour. So far the penalty is severe enough, if properly administered; but in too many cases it is not properly administered. Day after day we read in the papers of brutal assaults punished by fines. Nor even in this case do the punishments reach their full extent of £5. “Forty shillings and costs” is a favourite formula, where the sentence ought to be six weeks' hard labour.

Indeed, some magistrates—town and county ones \*—appear to think two or three pounds a heavy punishment for savage assault, while they adjudicate constantly on petty larceny by giving the full sentences of imprisonment under the Criminal Justice Act.

It would only encumber these pages to print examples of this erroneous leniency. Any man may pick out dozens of them from the last six months-old files of newspapers. It seems incredible that the magisterial mind should prove so callous to brutality. A person inoffensively proceeding on his business is perhaps knocked down, shaken, agitated, and injured by some drunken ruffian. Too often, in place of sharp and swift retribution, comes a solemn decision that the offender shall pay a sovereign, or two sovereigns, as the case may be. He pays it and vanishes, and his victim goes home, his nervous system shattered perhaps for weeks, to meditate on the commercial spirit of the administrator of the law.

We say commercial spirit. If this same ruffian has picked a man's pocket of a cotton handkerchief, he need expect no mercy. At least he will be summarily imprisoned, and he has the chance of indictment, and its corollaries of possible conviction and heavy sentence as well. Yet in the name of common sense and humanity, what proportion does his crime bear to a brutal and savage attack on a peaceable man, either in the spirit which dictates or the consequences which may accompany it? Yet the law is strong enough, its administrators weak.

2. Assaults on women are those which merit and sometimes meet (when the right man is in the right place) with the heaviest punishments. The 43rd Section of the Act above cited fixes a monetary maximum penalty of £20, or six months' imprisonment with hard labour for this class of cases if dealt with summarily. Yet month after month two classes of assaults

\* Since this was written, a man convicted at a city police-court of knocking down and beating a cabman who asked for his fare, and committing, as the alderman said, "a brutal assault," was fined 40s. and costs.



—violent and indecent—come before the various petty sessional and stipendiary benches, and in too many of them the pecuniary punishment is resorted to, and that most inadequately. Short space has elapsed since a ruffian attacked and struck a woman—a respectable married woman, a perfect stranger to him—more than twenty times, at a railway station, and otherwise roughly used her. His punishment was a fine inflicted by a London magistrate. Also, a young lady near Bolton, was brutally assaulted and thrown down in a footpath crossing some fields, while, according to the report, her hair was torn out and head injured, and the bench of magistrates sentenced the ruffian to three months' imprisonment. Many similar instances of misplaced lenity must occur to every reader of police reports. It is unsafe for any girl to walk alone in street or lane; and so it will be till every vagabond who waylays or molests them is doomed to six months' hard labour for each offence.

It is the height of absurdity to doom the perpetrator of small thefts to long terms of incarceration, and to allow the criminals who attack defenceless women in any shape to escape with a trumpery fine. Moreover, it offers a premium to well-dressed scoundrels to follow, annoy, and attack any female who may be solitary. And lastly, it teaches the lower classes to imagine, that so long as they let stealing alone, they may assault and insult with impunity. One special observation may be made on both classes of assaults, common and aggravated, before we quit this branch of the subject. It is not considered by many magistrates how many after-effects may follow assaults. Even a common attack on a man of business habits and regular life throws him, so to speak, or may throw him, out of gear, and affect his nerves for several days, long after his assailant has paid and forgotten the fine. And with respect to women, the argument is the same. Let our lenient justices consider their own feelings, if their wives or daughters were indecently or brutally assaulted. Let them consider the victims' outraged feelings, their terror, their nervous and hysterical tendencies, their constant fear of similar

attacks, and the agitation and anger of their male relations. When a paltry fine punishes a brute for attacks on defenceless girls, does it compensate for a thousandth part of these consequences? Even a sentence of six months' hard labour would hardly do it, much less a paltry fine.

And in many cases, even where the full two months or six months are allotted, the case ought to be sent for trial. A practice has grown up among magistrates of dealing summarily with assaults that ought most assuredly to be made the subject of indictment. Whether it be from anxiety to save expense, or whether it be from any other cause I cannot say, but certain it is that many cases are adjudicated on summarily that ought to be brought within the jurisdiction of a court empowered to inflict a heavier sentence. From whatever cause it may proceed, any adjudication by magistrates on a case unfit for summary jurisdiction, should be carefully discountenanced. Most especially is this rule to be followed in all cases of assaults on women; the case of Thompson, 30 L.J., M.C. 19, was one wherein the Court of Exchequer unanimously decided that in a case where conviction for an aggravated assault had taken place and rape had been proved, the justices should not have summarily convicted, but should have committed for trial.

A case of the most astounding description was reported in February last, in some of the London papers. It was one decided at the Aberystwith Petty Sessions. A young woman having been feloniously assaulted by two or three men (proof whereof the surgeon gave), the chairman of the bench, calling the prisoners "blackguards and cowards," sentenced them to short terms (none over four months) of imprisonment. The Welsh papers commented indignantly on this case, and it is impossible (so far as the newspapers may be relied on) to understand the decision. At the very least (if the evidence is correct), an indictment and assault with intent &c., should have been preferred. But beyond this, rape, so far as one understands the report, was proved. If so, it was dealt with

not even the maximum for an aggravated assault. No further inquiry has, we believe, been made, and of course our remarks are simply based on the accounts in the local and London papers.

Now, in all these cases, no consideration of expense, no regard for convenience, no undue lenity should be allowed to prevent prisoners being committed to the assizes. Indeed, it is difficult to overrate the importance of punishing crimes against defenceless women with the utmost severity.\*

3. Inflicting grievous bodily harm. We deliberately assert, that cases often disposed of by a magistrate under the mild *soubriquet* of "an assault," are properly subjects for indictment under the foregoing phrase. Biting off portions of the human face, knocking teeth out and breaking noses, are all, in our opinion, inflictions of grievous bodily harm; yet how many cases of this kind are disposed of by magistrates. Now, at the outside, two or six months' incarceration is, as we have shown, all that a magistrate in Petty Sessions can allot for the worse case of this kind. By indictment, such cases are punishable by two years' hard labour or penal servitude.

As sentences of three months' and six months' hard labour are common enough for trifling larcenies, any reader of common judgment may imagine the effect. The criminal classes know that for ill-treating a woman, beating a man, or breaking his facial appendages, they are not half so likely to get severe punishment as for stealing turnips or coals. It is almost impossible to write with patience on such an idiotic mal-administration of law—a mal-administration which protects primarily insensible property, secondarily sensible and sensitive human frames. The infliction of grievous bodily harm always carries consequences. It may entail heavy medical expenses, loss of income, impaired health, the prosperity of a family, and the sapping of a life. Therefore, it is a mockery—more than that,

\* A bench of rural magistrates lately sentenced a man who put his baby on a blazing fire to six months' hard labour. He was charged, according to heading of report, with "inflicting grievous bodily harm."

is a gross public wrong—when any functionary, be he judge, chairman, or magistrate, punishes the brute who smashes flesh and bone—the flesh and bone perhaps of the supporter of a family—lightly or weakly. Long terms of penal servitude—the sharp, bitter slavery of the convict stations and the lash—ought to be the portion of every man convicted of savage attacks, which mutilate and impair the frame and constitution. we say the lash, and we here avow our conviction, that if by the addition of a few words to the statute, the judges were empowered to add a maximum sentence of fifty lashes with a cat to every person being a male convicted of assaults that mutilated or inflicted grievous bodily harm, it would have the best and happiest effect.

And be it remembered, while the lash is used in the army and navy, no one can logically object to it for felons. While you punish crimes against discipline with flogging, there is every reason in favour of so punishing crimes against morality. What pity is there for the brutes, without a brute's virtues, who attack women, who mash and pound faces into jelly, who bite off ears, lips and noses, who put children on fires, who cut open heads with pewter measures, who kick their victims savagely in the most vital parts, and who beat women to death's door? Is any one so really an example of "maudlin sentimentality" as to have one word to say for malefactors like these? Savages as they are, without any of a savage's redeeming points, they merit the only punishment they understand—the sting of the lash. If pity be evoked, let it be so for the in-offensive people maimed, bleeding, racked with pain and stayed from their daily occupations by the attacks which merciful magistrates seem to consider far less heinous than paltry robberies.

Even as it stands, the law is strong. Why is it that in all cases where grievous bodily harm is proved to have been occasioned, a long term of penal servitude does not fall to the offender's lot? Why is it that watches and purses are guarded more sternly than heads and limbs? What in the name of

reason is their relative value? And when will the administrators of the law learn to deal their sternest measure out to the foes of life and limb, rather than the foes of the pocket?

4. *Manslaughter.* Making all allowance for the vast difference between murder and manslaughter—between homicides committed in cold and in hot blood—there is still a certain amount of severity to be shown towards any one convicted of homicide under the influence of evil passions. Now it cannot be denied that of late years, several instances have occurred of strange lenity towards persons convicted of this offence. Perhaps, one of the strangest instances (with all respect to the learned judge who tried the case) occurred at the last gaol delivery for Maidstone. A man was convicted of the manslaughter of his wife. The evidence proved that he repeatedly kicked the wretched woman (with threats and curses) till she fell insensible, and shortly died. A surgeon deposed that she had apoplectic tendencies and might have died—or did die—from that. A sentence of three months' imprisonment was passed. Now, granting the surgeon's opinion to have been correct, it is certain that an assault was proved in evidence, which was about as aggravated as any could be. At petty sessions, the perpetrator would have been liable to six months' and before a judge, to twelve months' imprisonment for an assault simply. And the witnesses deposed to expressions of the convict, which conclusively showed a brutal and savage intention to injure. This case was commented on severely by the press, and it seems in our humble opinion an inexplicable one.

It is all very well to draw and preserve a keen distinction between murder and manslaughter; but in all cases where any bad blood is shown, there should be a long sentence of imprisonment; I except cases of defence and gross provocation, of course, but in all others there ought to be a long term of imprisonment. Trivial sentences are very injurious to the estimation of the law in the eyes of people generally. The object of all criminal sentences should be to show that life, limb, and property are to be protected, but the former

much before the latter. Discrimination of this kind, properly carried out, would be a most valuable social improvement. What then are the suggestions to which the foregoing brief remarks are prefatory? They are four in number, and very brief. but the working out is respectfully recommended to the present Home Secretary, for the writer naturally feels confidence from the tried legal reforms which have emanated from his own party.

1. A circular from the Home Office to every bench of magistrates, pointing out to them the punitive powers of imprisonment, given by the 24 & 25 Vict., c. 100; and the heinousness of bad assaults over larcenies.

2. A clause in such circular recommending full terms of imprisonment wherever slight personal mutilation has been inflicted.

3. An Act of one section empowering the judges of assize to sentence all persons convicted of effecting grievous bodily harm, where there is permanent serious mutilation certified by a surgeon, to the penalties of the lash. The same power has worked admirably in garotte robberies.

4. A more liberal scale of expenses allowable in conviction at quarter sessions and assize.

It is our earnest and sincere hope that the grave and paramount subject so imperfectly touched on in this little paper may meet with the consideration of those most learned in the law. A crying evil exists—one attacked by the press continually—and until official action is taken in the matter it will not be remedied. As the remedy implies safety and security for all, and more especially for women, the sooner and more effectually it is applied, the sooner will such police reports as now disgrace our country, cease to appear.

WILLIAM READE, JUNR.

## ART. V.—COLONIAL BISHOPS.

IN the remarkable case before the Privy Council, in 1864, respecting the Bishop of Natal, it was decided that, in a colony possessing an independent legislature, the Crown could not by letters patent, issued by virtue of its prerogative only, create bishops having coercive jurisdiction; for that, without an Act of Parliament, or a statute of the colonial legislature, there was no power to erect a court possessing ecclesiastical jurisdiction; that power granted to the Crown by 1 Eliz. c. 1. s. 18, having been taken away by 16 Charles I. c. 11. The result of this judgment was that a general belief arose that Bishop Gray, of Capetown, and Bishop Colenso, of Natal, were, as it was at the time expressed in *Punch*, “a couple of bishops without any sees.” Acting upon some such belief, the trustees of the Colonial Bishopricks’ Fund refused to pay to them any longer their salaries as bishops, and thereupon Bishop Colenso instituted the suit of the *Bishop of Natal v. Gladstone*, to enforce the payment of his salary. Lord Romilly, M.R., delivered judgment in favour of the bishop, and he insisted very strongly that Drs. Gray and Colenso were not only bishops, but were possessed of sees, and could exercise their rights as bishops within their sees, but that according to the judgment of the Privy Council, they could not exercise coercive jurisdiction within those sees, but must resort to the civil tribunals for assistance in enforcing their decrees.

Now, some of the clergy of Natal, acting on the belief that the Bishop of Natal was a titular, and not a territorial bishop, and that the Church of England in the colonies was merely a voluntary association, have proceeded to elect the Rev. W. T. Butler, M.A., Vicar of Wantage, as their bishop; he has applied to the Archbishop of Canterbury and the Bishop of Oxford for advice in the matter, and the Archbishop of Canter-

bury and the Bishop of Oxford, in a joint opinion, have given in their adhesion to the belief that the clergy can so elect their bishops. Their letter, so far as is material, being as follows :—

“We have carefully weighed the difficult question which you have proposed to us as to your acceptance of your election to the office of a bishop in South Africa, and we have concluded that the decision of the judicial committee of the Privy Council having determined the position of our Church in South Africa to be that of a voluntary spiritual society, and that the letters patent held by Dr. Colenso confer on him no territorial jurisdiction or authority, there is nothing in his legal position to prevent the election of a bishop to preside over them by those of our communion in South Africa, who, with ourselves, hold him to have been canonically deposed from his spiritual office. Considering, then, the post of bishop to be vacant, and the needs of this district of South Africa to be urgent, we dare not advise you to refuse the call which has reached you.”

How does the matter really stand? The Queen issued her mandate to the Archbishop of Canterbury to consecrate Dr. Colenso bishop, and by letters patent created him Bishop of Natal, with all the powers and authorities belonging to a bishop. What, then, was the decision of the Privy Council? That he had no enforceable jurisdiction, and that the Crown could not create a new court in a colony possessing an independent legislature. But had he the less a diocese wherein to exercise his spiritual powers? What does Lord Romilly say :—

“In all the works I have consulted on this subject, the powers and authority of a bishop are classed under three heads :—1. *Ordo*. 2. *Jurisdictio*. 3. *Administratio rei familiaris* (the latter, viz. the administration of the estates of intestates, has been withdrawn from bishops by Act of Parliament and vested in another tribunal). The first, the powers of orders, he obtains upon consecration, which, according to the Catholic Church of Christ, of which the Church of England is a branch, is a sacred authority, derived by direct descent from the apostles. By this power, so conferred upon him, he may transmit the spiritual power he possesses to others ; he can ordain deacons and



priests ; he can consecrate and dedicate churches ; he can administer confirmation. This is the first and most important class of powers which a bishop possesses. These powers are not confined to this or that spot, but are universal. They extend over the whole world. But this, it is alleged, makes him only a titular bishop, and not a territorial bishop, for that by this he has no see or diocese attached to his office. In order to appreciate the force and value of this remark, it is desirable to ascertain the origin and distinction between a titular and territorial bishop. The primary reason why a diocese, or in other words, a limited territorial space, was originally assigned to a bishop, was not, as I apprehend, because his functions or duties were confined to that space, but because, as the superintendence of the bishop was found to be more effectual when exercised principally over a limited extent, a territorial district, termed a diocese, was assigned to him as the limits within which he should principally exercise his authority. Thus it is that England has been parcelled out into particular special dioceses, not that each bishop could not exercise his authority universally, but because it was justly considered to be more beneficial to the cause of religion and morality that his superintendence and labours should be principally confined to a separate district, and that he should not actively interfere with those members of the Church who were not within its limits," and "Thus it is that titular bishops have become territorial bishops, not because there was, or is really, when connected with the State, any distinction between the two, but because it was found conducive to the good of the Catholic Church (using that word as I do throughout in its proper comprehensive classical meaning), that the duties of the bishop should be limited practically to such a space as he could usefully superintend."

The 2nd, viz., *jurisdictio*, Lord Romilly holds that the bishop possesses, but without the power of enforcing the same of his own authority, he has no coercive jurisdiction, as decided by the Privy Council, and therefore, says Lord Romilly must resort to the civil tribunals for their assistance in enforcing his decrees, which assistance they will give or withhold after having examined whether he has or has not rightly exercised his jurisdiction. Lord Romilly then also says :—

"He is a titular bishop all the world over, he is a territorial bishop

within his see, or diocese of Natal; and with the assistance of the secular tribunals he can perform all the acts and duties which belong to the office of a bishop, according to the doctrine of the Church of England. It is clear that this was all that was included in the word bishop from the earliest institution of the office down to the time when, the Christian religion having become the religion of the State, coercive jurisdiction was conferred on the prelates of the Christian Church. It is in my opinion impossible correctly to assert that this necessity of resorting to the civil tribunal, instead of enforcing obedience by the jurisdiction of the Church itself, can annihilate a see or make it cease to be a legal diocese."

It is then clear, according to the views of the subject taken by Lord Romilly, that the terms "coercive jurisdiction," and a "legal diocese" do not reciprocally imply each other,—that the Crown can create a titular bishop and assign him a legal diocese, and thereby make him a territorial bishop, and yet may be unable to grant him coercive jurisdiction, and so erect a new court without the sanction of Parliament. That it assigns to him a legal diocese in order therein to exercise his spiritual functions is simply for the sake of convenience, in order that the bishop may confine his attention to one district, and the exertions of all the bishops on behalf of the Church thus be economised. The Archbishop of Canterbury and the Bishop of Oxford in their answer to Mr. Butler, relied strongly on the fact that the Church in the Colonies was described in the judgment of the Privy Council as a voluntary association. How does Lord Romilly speak of it?—

"In order satisfactorily to explain my meaning in this matter, it is necessary to point out what I consider to be the real position of the Church of England in these Colonies. It is declared in the judgment of the Judicial Committee that the Church of England in the colonies which have an established legislature, and no Church established by law, is to be regarded in the light of a voluntary association, in the same situation with any other religious body, in no better, but in no worse position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing

discipline within their body, which will be binding on those who expressly or by implication have assented to them. These expressions have created some alarm, which has, as it appears to me, arisen from an imperfect apprehension of what is meant by them. They do not mean, as some persons seem to have supposed, that because the members of such a Church constitute a voluntary association, they may adopt any doctrines and ordinances they please, and still belong to the Church of England. All that really is meant by these words is, that where there is no State religion established by the legislature in any colony, and in such a colony is found a number of persons who are members of the Church of England, and who establish a Church there with the doctrines, rites, and ordinances of the Church of England, it is a part of the Church of England, and all the members of it are, by implied agreement, bound by all its laws."

What is the result of this? That if they unite together as members of the Church of England, they are bound by all its laws. The Queen is the supreme head of that Church, she may issue the mandate to consecrate a bishop, and may appoint him a diocese in which to exercise his spiritual functions; all that she cannot do is to grant him coercive jurisdiction. There is a sentence, however, in the judgment of the Privy Council which has caused some difficulty, and we will therefore cite Lord Romilly's explanation:—

"On this subject an expression has been made use of in the judgment given in the latter case before the Privy Council, which is, I think, liable to be misunderstood, and which it is essential to notice. It is there stated to this effect:—The Lord Chancellor, who delivered judgment, having observed that after a colony has received legislative institutions the Crown stands in the same relation to that colony as it does to the United Kingdom, proceeds thus: 'It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a bishop, but it has no power to assign him any diocese or give him any sphere of action within the United Kingdom.' This sentence taken literally, that is, if the words 'United Kingdom' refer to the word diocese—is strictly correct, and such I consider to have been the meaning of the Court; but if, as some have supposed from the previous passage, it is construed to mean that the Crown

can create no see or diocese in any such colony as that of Natal or Cape Town; this, I apprehend, is not the meaning of the passage, and if it were, the passage itself would be erroneous. To be properly understood, the sentence must be taken in conjunction with the whole context. It is not thereby intended to state that the Crown is unable to appoint a person a bishop, and direct him to exercise his functions in a colony dependent on the Crown, to the extent specified in the judgment of *Long v. Bishop of Cape Town*, within certain defined limits, where these functions do not interfere with any other see or diocese lawfully created; nor is it intended to state that the territory, the limits of which are so defined, would not constitute a see or diocese properly so called; but it is thereby intended to state that the Crown has no power to constitute a see or diocese analagous to a see or diocese within the limits of the United Kingdom of England and Ireland, investing the bishop with coercive jurisdiction. For instance, that the Crown could no more have created the see of Natal, and appointed to it a bishop, with all the coercive powers of an English bishop over all the inhabitants in that colony, than the Crown could have created the diocese of Ripon, or the diocese of Manchester, and have appointed bishops to preside over such dioceses without the authority of an Act of Parliament. That this is the limited meaning of the passage is plain from the whole judgment. Were it to receive a wider construction it would not be in accordance with the judgment in *Long v. Bishop of Cape Town*, which it adopts and professedly follows. The decision in *In Re Bishop of Natal* did not decide that the Bishop of Cape Town had not, as bishop of the see or diocese, any *forum* or tribunal within which he could lawfully exercise his authority as bishop of that diocese, but that it was a *forum domesticum*, which did not warrant the proceedings he instituted against the Bishop of Natal, and that there was nothing in his acts to give the consensual jurisdiction essential to any such *forum*, and further that, consistently with his duty as Bishop of Natal, that is, as a bishop of the Church of England—he could not give any such consensual jurisdiction. In fact it is not the coercive jurisdiction which constitutes the see of the diocese. The early bishops of the Christian Church had a see or diocese as completely before as they had after the Christian Church had become the religion of the State. Polycarp was as much Bishop of Smyrna, and Ignatius as much

Bishop of Antioch, as Athanasius was Bishop of Alexandria, or Gregory Nazianzen Bishop of Constantinople, although the two former could only exercise jurisdiction over the members of the Church of Christ, who submitted to their jurisdiction, while the two latter possessed coercive power derived from the Christian religion having become the Church of the State. When this ambiguity is removed, the two judgments are identical. The importance of them, and more especially of that of *Long v. Bishop of Cape Town*, which expounds the principles of the law, and particularly the importance of the passages to which I have referred in relation to the *status* of the plaintiff in the district of Natal, is this: It shows that the district or colony of Natal is a district presided over by a bishop of the Church of England, which is properly termed a see or diocese—that the ministers, deacons, and priests, officiating within that district, and all the laymen professing to be members of the Church of England, constitute not a church in Natal in union and in full communion with the Church of England, but a part of the Church of England itself, and that all the ministers, priests, and deacons there officiating, and all the persons composing the several flocks are members and brethren of the Church of England in the strict sense of the term. The consequence is, that they had in all matters ecclesiastical voluntarily submitted themselves to the control of the Bishop of Natal, so long as it is exercised within the scope of his authority, according to the principles prescribed by the Church of England. It is the more important that the real *status* and condition of the colonial churches should be constantly present to the mind, because, as it appears to me, erroneous notions prevail to a great extent on this subject. Some persons seem to imagine that they were founded and endowed in order that the association in each colony should form a separate and independent church. So far has this been carried, that it seems to be supposed that, if the members of such colonial church, or a majority of them, should so think fit, they might, if dissatisfied with the person whom the Crown has appointed to be their bishop, withdraw from his superintendence and elect a bishop for themselves. That any number of persons, if they so pleased, might, though holding the doctrines of the Church of England, reject, either wholly or in part, the discipline and government of the Church, though they preserve their creed, faith, and doc-

trines of the Church of England is unquestionable. Such an association might elect their own bishop, they might divide the district in which they reside into sees, and elect a bishop for each; they might parcel the district out with parishes, appoint a minister to officiate in each parish; all this they might do, and all this would be perfectly legal, and all this would be binding on the members of the association who assented to it: as it is now in the Episcopal Church in Scotland, which is not, and by the Act of Union is prohibited from being a part of the Church of England, and in which the Crown is prohibited from appointing or nominating any bishop. If dissensions arose amongst the members of such a church, they must have recourse to the civil tribunals; but when they did so the question would be held by their own rules and ordinances, which would have to be proved by evidence in usual manner. But this association would not be a branch of the Church of England, although it might call itself in union and full communion with it. By the law of the Church of England, the Sovereign is head of the Church; and in substance (for the *conge d'elire* is nothing more than a form) no bishop can be lawfully nominated or appointed except by the Sovereign, nor, as I apprehend, could any person be legally consecrated bishop of such church unless by the command of the Sovereign. If the members of the Inns of Court were to present one of their preachers to the Archbishop of Canterbury, saying that they have elected him Bishop of the Inns of Court, and prayed that he might be consecrated, although the most reverend prelate might feel disposed to accede to such prayer, I apprehend that he could not lawfully do so, and that upon application a prohibition would issue from the Court of Queen's Bench to prevent such consecration. So, in like manner, the members of the church in Natal might elect a divine, and call him Bishop of Natal, or invest him with any other title; but even if the Archbishop of Canterbury could be induced to consecrate such a person in due form, he would, I apprehend, have no legal authority to exercise any of those functions which belong exclusively to a bishop of the Church of England. What his peculiar *status* in the Catholic Church of Christ might be I do not profess to state; but I apprehend that he would not be a bishop of the Church of England, and that when the validity of his ordination and consecrations came to be contested in a court of law they would not appear to have made the persons ordained,

priests or deacons of the Church of England, nor would the places consecrated by him belong to that Church."

Can anything be more plain than this? It would almost seem as if the Master of the Rolls had foreseen that such an election would take place, his judgment points so strongly to such an event. It is certain that some expressions in the judgment of the Privy Council are very open to misconstruction, but Lord Romilly was a party to that judgment, and agreed to it, and he assigns to them a meaning differing from that given to them by the Archbishop of Canterbury and the Bishop of Oxford. His opinion is that a number of inhabitants of a colony, members of the Church of England, uniting together, ministered to by clergymen of the Church of England, and submitting themselves to all its rites and ordinances, not calling themselves a church of the colony in union with the Church of England, but speaking of their church as *the* Church of England, are bound by its laws, and their bishops must be appointed as heretofore by the head of their church; and, therefore, that Bishop Colenso is Bishop of Natal, and the colonists, so long as they profess to be members of the Church of England, have no power to elect a bishop, and *à fortiori* to call upon the Archbishop of Canterbury to consecrate him. If they are members of the Church of England, their bishop must be appointed and consecrated according to the laws of England; but if they are only a voluntary association, and not members of the Church of England, the Archbishop of Canterbury has no connection with them whatever, any more than he has with the Roman Catholic Church in England.

DEANE P. PENNETHORNE.

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## ART. VI.—ELECTORAL BRIBERY AND CORRUPTION.

By MR. SERJEANT PULLING.

IN accordance with the intimation in our last number, we recur to the subject of Electoral Bribery and Corruption.

The *Law Magazine and Law Review*, dealing generally with matters which have a peculiar interest for the profession of the law, has in the present instance hit upon one affecting—not only the credit of the law, and of those who are engaged in its administration, but the good fame of all who are either entrusted with the elective franchise, or who, through their suffrages, are returned as the representatives of the people in Parliament—the welfare, in fact, of the whole community—the honour of the whole nation; and it is some satisfaction to observe that the opinions which have already been so expressed in the *Law Magazine and Law Review*\* have not only been approved of by other writers on the subject,† but have been in some degree adopted by those who have a voice in the Legislature.

If, happily, proof were wanting that bribery and corruption *extensively prevail* at the election of our representatives in Parliament, the disclosures in the cases of the four selected constituencies which have recently been brought so prominently under public notice, must supply that proof to the most wilfully blind and contented of the apologists of things as they

\* The first article which appeared in our columns in May last was subsequently reprinted and published under the title of "Our Parliamentary Elections. Can no laws protect the honest from the dishonest?" London: Ridgway, Piccadilly, 1866.

† We ought to mention particularly Mr. Christie's able articles on this subject, in the *Examiner*, since published by him in a separate form.



are. Such persons may, perhaps, believe that the plague spots which have so unmistakably broken out north, south, east, and west—at Lancaster, Reigate, Yarmouth, and Totnes—are not evidence of a general malady; but credibility like this is not of much value, and weighs very little against the general conviction, arrived at on so very unpleasant assurances, that the *elector-pest* at this day prevails as surely among the herd of voters as the rinderpest lately prevailed in our pastures and cattle markets.

Until the stain of corruption which now attaches to our electoral system can be wiped off—until Parliament can be induced to take up the matter in earnest—to *legislate in order to deal with it effectually*—the House of Commons' parade of a high tone of feeling will be regarded by honest men on the outside as a mere mockery; and powerless to vindicate the fair fame of England's Parliament will be all the panegyrics which enlisted eloquence in her happiest vein can utter. The stream that has pollution pouring in at its sources is sure to carry its impurity with it. It may require a practised eye to detect its presence—to carefully analyse and scientifically expose the working of the corrupting matter—to mark the exact current in which it flows—to show the various disorders it generates. The crowd may be deceived by the stream flowing so bright and so smooth, may joy in its sparkle, and laugh at the forebodings of philosophy, but the immutable laws of nature will have their way—*not even noxious matter is allowed to be annihilated*. The lurking poison will make itself felt when least expected. Ill will come of ill—now an isolated case of disorder show itself; now the plague spread, and the malady become epidemic.

There is in general a wholesome recognition of all this. In most matters of ordinary occurrence we take care to avoid the risk which arises from a *bad beginning*—we hold it, for instance, essential to the purity of the course of justice that it should flow from an unpolluted source. We do not readily acquiesce in the sentence of those to whose office or appoint-

ment a stigma of any kind attaches—the verdict of jurymen who have been tampered with before going into the box—the award of arbitrators whose power has a corrupt inception—the acts of trustees whose fiduciary character has been acquired by means of an underhand bargain:—and let Parliamentary blustering disguise it as it may, a similar distrust will prevail with respect to those who have acquired powers and trusts so much greater, and so much easier to abuse, by means of electioneering manœuvres and electoral corruption. High-minded may be the great bulk of England's public men—high the tone of honour which is in fashion among English gentlemen—and far be it from us to disparage that high feeling;—but so long as it remains a fact that the title of M.P. is to be obtained by corrupt means, and a corrupt motive *can* be assigned to the conduct in Parliament of men so elected, small blame to ordinary folk out of doors, who, though unable to follow out in the intricate course of the administration of public affairs, the exact *run* of the stream of impurity, yet refuse to believe that the pollution which comes in at the fountain-head has been somehow altogether absorbed; or to place implicit confidence in the absolute honesty of the career of *every* M.P. so made—the immaculate character of the ayes and noes on *every* Parliamentary division—the absolute honesty and justice of *all* the decisions pronounced by Parliamentary committees—to see the justification for diverting so constantly at the importunity of honourable members the due course of administration of public trusts—and the fair dispensation of Government patronage and the public money; and for the daily ignoring deserving claims for promotion in the public service, and perpetrating what, to common people, unbiassed by the *morale* of the Circumlocution Office, appears a sorry course of dishonest jobbing and breach of trust.

It is at this day the practice of many people dogmatically to pronounce bribery at our elections as *a necessary evil*, which public opinion within or without the doors of Parliament is not strong enough to put down; and this notion is certainly

not discouraged by the way in which the topic is at present received in the House of Commons.

In that august assembly of English gentlemen, it is, unhappily, but too true that the stigma attaching to an honourable member of having gained his title of M.P. merely by means of bribery, has come to be regarded with so little abhorrence that discussions on the subject are somehow generally provocative of mirth. One of the ablest of our evening journals in describing a very recent speech on this subject by Mr. Disraeli, observes—"We find him keeping the House in roars of laughter, with graceful *badinage* about the Opposition members who had been reported guilty of corrupt practices. It is not very obvious to outsiders what was the precise point of the joke, as, indeed, is sometimes the case with jokes that amuse the House of Commons. But it is plain that imputations of bribery, if not exquisitely comic in themselves, are not in the least inconsistent with a lively bit of comedy. The scene reminds one of what sometimes occurs between two fast young fellows, one of whom has accused the other of being drunk. His companion replies, with facetious circumlocution, that if he has not made a mistake of personal identity, he *rather* fancies that he has seen his kind monitor with a drop or so too much himself. It is very funny and amusing to the actors, but it does not indicate a very high value for the virtue of sobriety."\* It would be difficult to express more plainly the tone which honourable members, bored with complainings about bribery, adopt when they are together; persuading themselves that this tone is but a mere echo of English *public opinion*.

Many vices, and indeed crimes, which in former days were winked at as, at most, *necessary evils*, have now come to be regarded in a very different light. They have succumbed, like most maladies, to proper treatment. Let similar treatment be legally prescribed and duly administered in the case before us,

\* *Pall Mall Gazette*, Thursday, March 21, 1867.

and we should soon find succumbing to it the odious malady which is now the bane of our boasted representative system. Public opinion would then as soon come in to discourage bribery and unfair conduct at elections as it does dishonesty and meanness in the ordinary affairs of life.

Our statute law prescribes, in the case of persons legally found guilty of electoral corruption, penalties severe enough at the present time, it is true; but though the offenders swarm, somehow or other very few indeed ever are caught and punished. Like the quaint directions of Mrs. Glasse for cooking hares, or the French professor's elaborate specific for dealing with little fleas, our bribery laws commence with a sly suggestion that *first of all you must catch* the offenders. In the case of electoral bribery and corruption the legal tackle for catching offenders, or affording fair protection from them, is at every turn singularly clumsy and deficient. The chances of escape really seem to be multiplied on purpose, and the punishment held *in terrorem* to be advisedly of such a character as in no way to act as a deterrent either to the briber or the bribed. The law prescribes pecuniary penalties—a matter of easy arrangement on the rare occasions when legal proceedings are taken to enforce them—but there is nothing in a conviction for bribery at this time, which involves any serious loss or risk to the offender, either by way of personal inconvenience or the forfeiture of character or social position. To judge, indeed, by the provisions of our law at this time, we might almost think that electoral bribery in *moderation* was altogether venial, and that unless it *extensively prevail* it should not be interfered with, serious measures only becoming necessary when electoral corruption has attained such a head as to demand extraordinary treatment. Candidates backed by a sufficient quantity of money, and accommodating voters eager to get a share of it, find the network of the existing bribery laws very easy to break through, and corruption works its way without hindrance from the back parlour of the borough inn or the little office or shop of the £10 householder, to the chamber of England's

representatives, where a bribery scandal will be in all probability treated as a good joke.

The history of society in England carries us back to the period of many offences which have gradually given way to proper legislative treatment—to the time of the outrages arising from religious intolerance, which the criminal code could not grapple with, but which ceased with the laws for religious emancipation—to the days of the wholesale smuggler, whom no penalties could deter, whilst capricious legislation, wearing the semblance of *trade protection*, offered him encouragement, but who gave up when these were removed and trade was made free—to the days of the infamous traffic in human beings which defied all the rigours of our laws against the slave-trade, but ceased, at least as far as Englishmen were concerned, when our law established free labour throughout the empire. So electoral corruption will cease, when proper means are taken, by the substitution of a simple for an artificial system, to keep under subservience to order and law the proceedings at our elections, enabling those who wish to have the honest protected from the dishonest voter—to see all irregularities inquired into inexpensively, at once, and on the spot—to remove, in fact, the briber's protection, to neutralise his efforts, to brand him with dishonour, and to make the business of those who are engaged in electoral corruption altogether an unsuccessful one, instead of, as at present, the only dishonest calling that the law practically protects and encourages.

In previous articles on the subject now before us\* we have traced the growth of electoral corruption from the time when it showed itself in the simple form of a bribe to the returning officer, to these our days, when the sad truth is conveyed to us that the term "purity of election" is merely used by way of derision—when it is no longer a question whether corrupt practices generally prevail at our elections, but whether the scandal on any given occasion is so notorious as to call for

\* See *Law Magazine and Law Review* for May and August, 1866.

extraordinary notice and extraordinary treatment. The subject was further dilated on in a paper recently read by the present writer before the National Association for the Promotion of Social Science,\* and we make no apology for now reiterating some of the observations already published in that paper on the subject of the failure of legislation hitherto to deal effectually with this great evil.

"Penal legislation has been tried and found altogether inefficacious. The heavy machinery of Parliamentary Committees and Parliamentary Commissions has been kept in work raking up the foul substratum, but not advancing one step in purifying the stream. Moral influence, which has put down so many vices, in this instance is altogether powerless. The eager spirit of competition here sets honourable scruples altogether at defiance, leaving to do its worst the odious maxim that 'everything is fair at an election;' and whilst competing candidates bid almost without reserve against one another, the possessors of the thing bid for say they are only doing as their neighbours do in making all they can in the market.

"Bribery is no new crime. It prevails in some countries in a low scale of civilization as a part of the ordinary transactions of daily life; we shall find that our statute book and our older law books speak of bribery of judges and every kind of public officer, and indeed the records of our courts show that the general laws against bribery had to be put in force even where the accused was decked in the judicial ermine. Not to go back to more ancient times, we learn from these records that in the reign of Edward III, a chief justice was convicted of receiving five several bribes from persons who awaited judgment in his court.† In the next reign we find a Lord Chancellor solemnly charged in Parliament with taking a bribe of £40 from a suitor;‡ and six years after the Great Revolution of 1688 had driven a corrupt dynasty from the throne, the records of Parliament disclose that a thousand guineas from Guildhall tempted the Speaker of the House of Commons to get the City Orphan's Bill to be passed, thus conferring on the lucky Corporation a legal right to tax for their own benefit all coal imported into London.

\* 2nd February, 1867.

† Co. 3 Inst. 147.

‡ Rot. Parl. 7, Ric. 2, 1384: Part 2, Nos. 12 to 15.

"Happily at this day the notion of corrupting our judges by a bribe is never dreamt of, and our statesmen and government officials are proof against all such attempts on their integrity. The force of public opinion, no less than the honourable feeling of our public men, secures this; but were they not so actuated, the preventive against their taking a bribe would be found not in the rigour of the penal laws, but in the direct and inevitable consequences to themselves. A charge of corruption at this day against a judge or magistrate, or any public officer, would be instantly investigated in the proper quarter, and the delinquent, dismissed with ignominy from his office, would find himself permanently precluded from holding any other. This remedy is wholly efficacious. The officer, high or low, nay, the professional man, the agent, or the servant who has been corrupted by a bribe, is thenceforth practically a ruined man. He has been invested with a trust, and has forfeited it by his own act. The certainty of the punishment tends most effectually not only to prevent bribery and corruption, but to keep up a tone of feeling that deters those who would otherwise attempt the offence. Are those entrusted by the law with the elective franchise, and with the great duty of choosing our representatives in Parliament, to be dealt with on a different principle? Is our representative system to be always subject to pollution at its source, and the investigation into bribery and corruption in this case always to be dilatory and uncertain, and the delinquents practically to escape with impunity? Is there any reason to doubt that if an equal certainty of detection, and a similar result followed in the case of electioneering bribery as in other cases, that the evil would die a natural death? Is it not possible to effect this by the substitution of a more simple and expeditious procedure with reference to our elections, for the cumbersome machinery now in use?

"At present, as we all know, the Queen's writ for an election is returnable on a certain day (not less than fifty days from the day it is issued), and the sheriff or other returning officer having given notice of the day fixed for the election, the nomination takes place on that day, and the polling on the next. The day after the close of the poll the only duty now devolving on the returning officer is to cast up the votes, declare the poll, and proclaim the members. Bribery, corruption, and intimidation may have run riot at the election;

deceased or absent voters have been personated by impostors; the election, in fact, have been a mere mockery; but as soon as the clerks employed to cast up the poll books have finished their sums, the returning officer has only to proclaim that the candidate who heads the poll is duly elected; and he can only be unseated by an election committee, sitting in London many weeks or months afterwards, with just so much of the facts before them as the Parliamentary agents may agree to supply them with. The right to retain the seat may be made a matter of amicable arrangement between those gentlemen, or may be contested and ultimately disposed of at a ruinous cost between the rival candidates; but unless to the expenses already incurred the committee should deem it right to suggest the addition of those of a commission of inquiry, the bribers and the agents of bribery and corruption altogether escape punishment—indeed, are too often well paid for their additional trouble. The agents can always contrive to ‘make things pleasant,’ and the free and independent electors live to hope for another election, and to join in the laugh at the so-called laws for prevention of bribery and corruption.

“It is to the House of Commons itself that this state of things is for the most part to be attributed. The writ for the election of a Member of Parliament is a writ issued by the Crown in accordance with the law of the land, and the question of its due return is by the fundamental rules of our Constitution as much a matter of *mere law* as any question raised by a *quo warranto* or other strictly legal proceeding. By an Act of Henry IV. (11 Henry IV., c. 1,) the examination as to the due return of such writs was distinctly conferred on the judges of assize; but, as the House of Commons has gradually usurped this jurisdiction [to their own great scandal, and to the practical abolition of freedom of election,] until that august assembly think well to put an end to the anomaly, bribery and corrupt practices at elections will prevail, whether electors vote openly or by ballot.”

The time has now we hope arrived when the anomalous claims of the House of Commons to have the exclusive cognisance in election matters will give way to a jurisdiction more in accordance with the fair spirit of our constitution and the first principles of justice, which prohibit men sitting as judges when their own personal interests are involved. We do not despair



of seeing this concession at last made with a good grace, and further, of finding, instead of our present clumsy legal contrivances for dealing with corrupt practices at elections, provisions made which will have the effect of preventing as well as punishing such offences, and securing, without the questionable aid of the ballot-box, freedom and purity of election.

Our readers will remember that the plan we have already proposed,\* consists of two parts. First of all in securing at every election, before the return of the writ, such a supervision of the proceedings, on the spot, as the circumstances of each particular case may warrant: all corrupt practices being at once brought to light, and the first step towards the discomfiture and punishment of the wrongdoers taken before they have obtained the advantage:—and in the second place in an effectual system of revision, weeding altogether from the voters' lists the names of all who have shown themselves, by their corrupt conduct, to be unfit to be admitted within the pale of the franchise, or who, having already forfeited their social status by the commission of crime, or fraud, have not retrieved their character by subsequent good conduct.

The ordeal to be gone through before the return of the writ, should be of such a character as, without involving the necessity of the expenditure of time or money more than the circumstances of each case may call for, should afford a full guarantee that the member returned has really been *duly elected*. With this view we have proposed that the Revising Barrister, as Assessor to the Returning Officer, immediately after each election should enter on a legal supervision or scrutiny of the proceedings, armed, as election commissions now are, with sufficient powers for getting at the truth, he would be able effectually to deal with all irregularities and illegal or corrupt practices at the election by treating as invalid all votes objectionable on those

\* In the August number of the *Law Magazine and Law Review* of last year will be found the sketch of a Bill for carrying out the writer's suggestions.

grounds, and summarily convicting the offenders. A few wholesome provisions such as we have already suggested for regulating the duration of the assessor's inquiries, the proper appropriation of penalties and also for awarding costs in certain cases, would suffice to prevent this inquiry being either dilatory or expensive: and there can hardly be much doubt that it would be *altogether effective*.

To get rid of the corrupt element at elections, and more completely to make a distinction between the honest and dishonest, it is necessary to deprive of the franchise all persons of proved bad character—not only, as the law professes to do now, the actual felon convict, but everyone who, within—say five—years previously has been legally adjudged guilty of any felony, conspiracy, or fraud; or of bribery or intimidation or other corrupt practices at any election, or attempts to commit those offences; and on proper proof being given at the revision of the voters' lists, the Revising Barrister should be required to strike out the names of any such person from the voters' lists; and whether so struck out or not the vote of any such person should be held bad on the subsequent scrutiny; and the voter who, in defiance of such objection to his exercise of the franchise, presumed to exercise the same, or claimed so to do, should be deemed guilty of a misdemeanour, and sufficiently punished accordingly.

These provisions would, it seems to us, serve more effectually as a protection against corrupt practices than any that have yet been suggested; not omitting the remedy so loudly called for by some reformers—the ballot. That mode of protecting the voter at the poll, would, it appears to us, serve very little to put an end to electoral corruption. The ballot-box, wherever it is adopted, may perhaps serve to screen the individual voter from personal annoyance or remonstrance. He may be enabled to make it doubtful how he has voted on any particular occasion. He can, in the dark, give full vent to his good or bad propensities, put in the black or white ball from a motive of personal spleen or sordid gain by the event of the election. That

event may equally depend on the use of corrupt influence and pecuniary bargains with electors to secure it. It may be equally sure that bribery has done its work, and that the victorious majority has *been bought*; but the screen of the ballot-box, though it cannot prevent this, will effectually save each offender from punishment for his dishonesty.

As long as our elections continue to be conducted by means of open voting, there can be little difficulty in getting, on the spot, immediately after any election, at the truth affecting any suspected voter's conduct. This always comes to be considerably distorted at a distance both of time and place. Moreover, when those who are engaged in the work of corruption find that, instead of the inquiry commencing, as it does now, rarely and capriciously, it followed inevitably in every case, they would pause in their distasteful work; and if, as the result of such an inevitable inquiry, those who had been a party to corrupt practices at the election, by giving or receiving or promising bribes, or endeavouring in any way to coerce or intimidate the voter, were to find their evil-doings altogether inoperative, and themselves shut out for the future from the pale of the franchise, and branded, in company with the condemned criminal, as ineligible for any place or office of trust, high or low; those who now dare the risk of the penalties the law holds out, would hesitate before they offended, and from the mere instinct of self-love avoid the business of bribery, as bringing even to themselves immediate loss instead of gain; being convinced, after all, that, even in election matters, honesty is the best policy.

Since writing the above, we have seen the Government Bill "For the More Effectual Prevention of Corrupt Practices and Undue Influence at Parliamentary Elections." This Bill contains many important and useful provisions, and adopts some of the suggestions made in the *Law Magazine and Law Review*, e.g., the establishment of a court of enquiry into corrupt practices on the spot, in lieu of the present system; the defects and abuses of which we have endeavoured to point out—and the

addition to the existing penalties for bribery, etc., on the part of the candidate, of that of disqualification to sit in Parliament. The material difference between the provisions of this Bill and of that which was published in our columns,\* is that in the Government Bill the commissioners are to be appointed by the speaker to enquire into corrupt practices, only after *a petition has been presented* by a defeated candidate, or any three electors, bound by *recognizance to the amount of one thousand pounds* for the costs of the petition—whereas it will be seen that our plan consists in an enquiry into the proceedings at *every election*, by the returning officer and competent assessors, *before the return of the writ*. We see no reason to abandon the arguments we have already adduced in favour of our own plan as the most certain mode of securing regularity and fair dealing in the conduct of the election. It is but too notorious that by a judicious outlay of money from the same coffers as those which supplied the bribes, a threatened *election petition* many generally be very cleverly *arranged* before any effectual step has been taken to expose and subject to just punishment the iniquities of the election—and there is nothing in the Bill now before us to prevent this being done. Moreover the expenses of the proposed commission, when corrupt practices have really to be enquired into, will certainly not be less than those of the assessors proposed by ourselves; and where the duties of the assessors happily justify them in finding that the proceedings at the election are free from any imputation, the expenses incurred by them, must, as we have already observed, be so small as to really be of no moment, considering the great advantages that would arise from the enquiry being known to be inevitable.

We view the Government Bill, however, as a step in the right direction, and we venture now to suggest that if in committee there were incorporated with it some of the clauses in the Bill proposed by us, a very great step would be made in checking one of the greatest evils of our time.

\* See *Law Magazine and Law Review* for August, 1866.

## ART. VII.—THE ENGLISH BAR.

WHILE it is our principal object to direct attention to the present position and future prospects of the English Bar we shall endeavour also to throw some light upon the constitution and government of that learned corporation—a subject little understood beyond the limits of the legal world. Most persons of education, indeed, comprehend the distinction between barristers and attorneys, and the difference between their respective functions; but even of these, few are able to appreciate the meaning and relative dignity of the several denominations and grades of which the Bar consists; fewer still are conversant with its rules of practice and discipline. Latterly, however, the fame, good or evil, of certain legal personages, has aroused a more lively interest in barristers and their fortunes. Of some lawyers at the present time practising at the Bar, of some who still adorn or who lately adorned the Bench; all men say all good things; unhappily also, the misdoings of some eminent advocates of high forensic and in some cases of senatorial position, with their sudden collapse in utter ruin alike of character and fortune, were not long ago the subject of general marvel and discussion. In truth, society at large is deeply concerned in the honour and integrity of the Bar, inasmuch as in the discharge of their duties barristers are closely connected with the highest of human interests—the administration of justice.

“They are entrusted with interests, and privileges, and powers almost to an unlimited degree. Their clients must trust to them at times for fortune, and character, and life.

“The law entrusts them with a privilege in respect of liberty of speech which is in practice bounded only by their own sense of duty, and they may have to speak upon subjects concerning the deepest

interests of social life, and the innermost feelings of the human soul. The law also entrusts them with the power of insisting upon answers to the most painful questioning ; and this power again is, in practice, only controlled by their own view of the interests of truth.

"It is of the last importance that their sense of duty should be in active energy proportioned to the magnitude of these interests."

We have here borrowed the language of Lord Chief Justice Erle from the judgment delivered by him in the case of *Kennedy v. Brown and wife*, which is to be found in the 13th volume of the "*Common Bench*" and the 32nd volume of the "*Law Journal Reports*;" language having the greater weight, inasmuch as it fell from the lips of that high-minded judge. In this passage, in our opinion, he has nobly and truly expressed the grave responsibilities and duties which rest upon advocates. Men's dearest interests must at need be confided to them, and high qualifications, as well of honour as of ability, are demanded from them. Although, therefore, we regret that some scandalous offendings have stained the fair fame of that noble and useful calling, we believe that both society and the profession will gain by their exposure.

For many years to come, at all events, we need not fear a repetition of the career of Mr. Edwin James. The most reckless adventurer will probably esteem the position once ostensibly held by him, even at the moment of its fairest promise, dearly purchased by the risk of similar disgrace. Imprecuniosity and impudence will, for a while, at least, we hope, cease to recommend lawyers of dubious character to the confidence of constituents of any shade of politics. The governing bodies of the Bar, aroused to greater vigilance over those amenable to their authority, will surely avail themselves of the earliest opportunity to effect much needed reforms in their own tribunals.

The Bar of England may be divided into two main branches, namely, the Equity and the Common Law Bar. The former confines itself to practice in the Courts of Chancery, which, with a single exception—the Chancery Court of the Duchy of Lan-

caster—are permanently seated in the metropolis. The members of the latter, by means of the circuits travelled by the judges, and the more popular nature of their business, are better known to the general public than their brethren of the Equity Bar. Before the judges of the Common Law Courts comes all the more serious criminal business of the country. Members of this section of the Bar, as successful advocates on the criminal side on their several circuits, not unfrequently achieve a reputation for acuteness and eloquence, leading to success also in the higher walks of the profession.

Skill in addressing a jury, though perhaps not the highest, is still a very high qualification for successful advocacy. It is very difficult to describe exactly the qualities essential for its acquirement. An easy flow of language is doubtless indispensable to the success of every public speaker; but he who seeks to gain verdicts has need of many qualities besides fluency of utterance to win the attention and captivate the judgment of a jury. To this end mere volubility is of little avail. The talent perhaps most essential is tact, for without this useful gift even great oratorical power fails in the arduous contests of the courts; while by its aid, as by a beacon's light, the cautious advocate perceives and shuns dangers unheeded by a perhaps more brilliant but less subtle antagonist. The battle once begun, an advocate should be prompt to decide upon his line of action and strenuous in its maintenance when determined; moreover, let him appear to be in earnest in his contention, as though impressed with the truth and justice of his cause.

The whole end and object of the art of advocacy being to win the sympathy and convince the judgment of those addressed, a speaker should, on all occasions, adapt his discourse to the feelings and understandings of those whom he strives to persuade. Finally, with force and clearness must now be united brevity of speech; of all errors, prolixity is the least tolerated; and very rare, at the present day, are the cases in which a lengthy oration is necessary or even permissible.

Such a combination of qualities procures their fortunate

possessor not only ample employment, but also a wider fame than higher mental endowments without such gifts generally earn. Of the laurels gained in this branch of legal practice, the members of the Equity Bar have hitherto had no share. In those courts, until very lately, a jury was unknown; and even now the intervention of that tribunal is of rare occurrence; there, the courts themselves, courts, with one exception, consisting of a single judge, decide almost all questions upon evidence not given orally before them. Thus, without witnesses to examine and to test, or a jury to address and persuade, counsel could but scantily exercise or display either their astuteness or their eloquence. It follows, then, that advocates eminent in the Common Law Courts enjoy a wider if not a higher reputation than the leaders of the Courts of Equity. Upon the several circuits, the public—especially its fairer portion—throng the assize courts, and listen in admiring wonder as the favourite orator of the day appeals by turns to the passions, the prejudices, the sympathies, or the reason of the jury. The audience carry away from these scenes vivid and perhaps exaggerated impressions of the skill and eloquence of the speaker, and thus his fame is noised abroad and quickly spreads beyond the narrow circles of the profession.

We have before observed that, without its own limits, little is known of the internal institutions of the forensic body and the rules and system of its government. The different denominations and grades into which it is divided—Queen's counsel learned in the law, serjeants-at-law, doctors of law, masters of the bench of the several Inns of Court—these all seem a complete mystery to the majority even of the educated public.

Barristers consist of three grades or ranks, namely; Queen's counsel, serjeants-at-law, and outer or utter barristers—the rank and file of the profession—to these may be added the advocates of the ecclesiastical courts, who are now entitled to practice as counsel in any of Her Majesty's courts of law and equity, as if they had been duly called to the degree of barrister-at-law. In olden times, the degree of serjeant-at-law



(*serviens ad legem*) was the most honourable known in the legal profession. Even to the present day the custom continues of admitting into this venerable order the judges of the three Common Law Courts upon their advancement to the Bench. Hence, a serjeant is in court always addressed from the Bench as "brother;" this barren distinction, however, being almost all that is left to them of their ancient privileges. The rank is in little request in these days, being reckoned of but secondary value, without the precedence necessary to place its bearer upon an equality with a Queen's counsel. It is, however, occasionally sought by those who, though they may have arrived at a certain standing and enjoy a moderate practice, nevertheless see no prospect of being included in the list of Her Majesty's counsel. Upon attaining to this degree, a barrister leaves the Inn of Court to which he has previously belonged, and becomes a member of Serjeant's Inn. The serjeants, therefore, with the fifteen judges, form, as the members of that society, a body of themselves, apart from the rest of the profession.

At present the leaders of the English Bar are, for the most part, to be found among Her Majesty's counsel, the Attorney-General being the recognised head of the whole body. To become one of Her Majesty's counsel is the object, at some period of his career, of every barrister who aspires to play a leading part in the superior courts of law or equity. We may observe that the patent of a Queen's counsel is, with few exceptions, conferred only upon those who, as juniors, have enjoyed considerable business at the Bar; these exceptions having been generally made in favour of men of some political or literary eminence.

Barristers obtaining the patent of a Queen's counsel are, thereupon, in most cases, elected Masters of the Bench or Benchers of their Inn. The electors to this dignity are the benchers themselves of the respective Inns, and a very small proportion of dissentient votes excludes a candidate. There is, therefore, good security that no individual will be elected a

bencher unless his professional and private character are alike without a stain.

There are four Inns of Court, each having the privilege of "calling to the Bar;" namely, Lincoln's Inn, the Inns of the Middle and Inner Temple, and Gray's Inn.

In each Inn, besides the

"Most potent, grave, and reverend signiors,  
The very noble and approved good masters"

of the Bench or benchers of the Inn, there are two other grades: barristers-at-law and students-at-law. The benchers constitute the governing body of each Inn, they administer its affairs, manage its property, and call its students in due course to the degree of barrister-at-law. The power, moreover, which makes, can also unmake; the Bench which confers the privileges of the forensic toga, can also unfrock the wearer who bears himself unworthily. The importance of the trust thus confided to the benchers in the exercise of these powers can scarcely be exaggerated; since, in fact, they hold in their keeping the credit and good fame of a profession whose utility to society is measured by the honour and integrity, as well as by the ability and learning, of its members. Should a barrister feel aggrieved by the decision of the Bench of his Inn, he may appeal to the fifteen judges, whose verdict is final. The disbarment but a few years ago of an eminent advocate, and the revelations of a trial still fresh in the minds both of the profession and the public, have given a general insight into the exercise of their powers by the benchers.

That some control and supervision over the conduct of barristers ought to exist, and ought to be such as can be practically enforced against delinquents, cannot be doubted. Nor will it be denied that a tribunal within the profession, possessed of full powers to judge and to punish offenders against professional usage, or the general laws of honour and honesty, is required not only for the correction of delinquent barristers, but also for the protection of suitors in our courts.

But it is submitted that some alteration is needed in the mode in which the existing tribunal of the Bench carries on its proceedings. While the benchers have ample powers over any member of their Inn, whose offences are brought before them, their authority over the instruments of evidence upon which to form their judgments is very limited. Some of the most valuable prerogatives of a court of justice are wanting to the courts of the Bench. They have, in fact, no power to enforce the attendance of any witness, or to compel the production of any document. The tribunal itself is unmanageable from its numbers, and from its very constitution is liable to variation from day to day as an inquiry proceeds.

The unsatisfactory action of the court or parliament of the Bench, as at present constituted, was not long ago manifested in a too notorious case—an investigation marvellously protracted came after all to an abortive result, a conclusion mainly due to the defective machinery of the court itself.

It is true that in another instance a great offender was convicted and expelled from the profession he had disgraced. But these are not, unhappily, the only examples of scandals touching members of the Bar. Other cases have occurred which even more strongly prove the necessity for an accessible and effective tribunal to take cognizance of professional misdemeanours.

If we examine the elements of which that confessedly learned and honourable body, the English Bar, is now composed, we may perhaps find some explanation of the comparative frequency in these later years of malpractices amongst its members. The four Inns of Court receive their recruits from every rank and degree of educated men. The younger sons of our noble families come to the Bar with an eye perhaps to some moderate and early provision; or, more ambitious, looking upon it as one of the recognised avenues to distinction and wealth. Country gentlemen send their elder sons to study and practice in the law for a while, to qualify them thereby for fulfilling with larger usefulness the duties of the magistracy and the legislature; young men of every class, at the close of their university

career, have for the most part to elect between three roads in life: the Church, the Bar, the public service. Large numbers of these youths throng the halls of the Inns of Court, and form in after life the most valuable addition to the legal ranks.

Some few, leaving the lower branches of the profession, come in middle life to try their fortune at the Bar. These bring with them experience and habits of industry, and rarely fail to achieve moderate success, though seldom attaining to the highest posts; others again turning with disappointment from widely differing walks of life—as from a naval or military career—assume the uniform of the law, to find too often that their previous training and habits have unfitted them for its labours. There are certainly several instances of the highest legal eminence having been attained by men who in early life have served in the army or the navy. Still, as a rule, the law is a jealous mistress; one who, to be won, must be early wooed, and with the earnest devotion of a first passion. The orators of the platform, whatever their original calling may have been, not uncommonly seek to repair, by forensic practice, fortunes for which their reputed powers of oratory have previously done but little; often also the legal and parliamentary reporters for the public press quit their humbler occupation for the more exalted honours of the Bar.

Here and there in the crowd we mark, with pity for his too certain fate, the careworn face of some self-educated peasant. The ambition which has inspired his toil in the unwonted fields of legal labour is doomed to inevitable blight. He may have assiduously sown, but to him the harvest-time comes not, and at length, with broken heart, and perhaps, alas! in the bitterness of poverty, he learns how fallacious have been his hopes—how fatal his mistake.

From this sad but faithful picture we turn to some with brighter promise in the future, who await only their call to the Bar to bid their native land a long farewell. These are students training for the Colonial Law Courts, and we are happy to believe that in most instances these learned exiles

reap an abundant harvest in the far-off fields of their labour; success thus compensating their banishment. Finally, the students from the sister kingdom, destined for the Irish Bar, contribute to fill the dining halls of our Inns. But they, with the class lastly before named, have no actual place among the Bar of England, the subject of our present consideration.

We find, then, that the gates of the Inns of Court are open to all comers. In the forensic republic they know at the outset of each man's career no distinction of rank or degree. Every combatant in the arena has his reputation in his own hands, to make or to mar; as he uses his weapons so will he be regarded by his competitors, and by the measure of their goodwill will he be esteemed beyond their circle.

Of those who pursue the profession, some succeed in obtaining business, many fail. It should, however, be observed that failure in this respect does not by any means imply the absence of the qualities essential to forensic success. A barrister may be fully competent, he may have done his utmost to merit, but he may not solicit, and without legal connection he cannot command, employment. Years roll on: circuit succeeds circuit; his contemporaries leave him behind; his juniors pass him by; but the golden opportunity may never come to him; and men grow grey as—

“They learn to labour and to wait.”

None but those who have experienced the “heart-sickness of hope deferred” can tell the utter weariness of these men's lives, as, with hope extinct, they pursue the tedious routine of terms and circuits. They have our warmest sympathy; but their successful rivals, the men who transact the business of the courts, who fill the public eye, who must in course of time occupy the judicial seats at home and in our colonies, claim our present attention. These drawers of the prizes of the profession may be divided into those who obtain and conduct their business fairly and honestly as regards both their brethren and the public, and those who court employment by practices

which honour condemns. This latter class is, we fear, more numerous than beyond the legal world is commonly believed; we must explain, however, for the benefit of the general reader, in what this censurable malpractice consists. Many acts are in violation of the rules of the Bar, which are not in the ordinary sense of the word dishonest; but surely all the members of a profession are morally bound to observe its laws, and to break them for selfish objects is certainly unfair, not to use a stronger term, towards those who observe them.

A few words upon the general laws which govern the practice of the Bar will serve to elucidate our meaning.

One rule of the profession is that in no case can a barrister receive any instructions or fee excepting through an attorney. To this rule there is but one exception: in the case of a prisoner in the dock awaiting his trial. Such a prisoner is entitled, upon tendering the lowest fee which a barrister can accept, to instruct personally any counsel there practising to defend him. This is a privilege belonging to the accused, and not a right appertaining to the Bar. It should be added that it is the duty of the barrister, whom a prisoner under such circumstances selects, to undertake his defence. The general rule being as above stated, it is manifest that the amount of a barrister's business in his early days must depend upon the favour which he finds in the eyes of the other branch of the profession. Hence the temptation to attract that all-important good-will by means other than the fair display of ability and knowledge, proves too strong for men whose need or whose ambition overpowers their sense of honour. Among the lowest sort of attorneys, these arts are, we regret to say, only too successful; but we imagine that even while they continue to employ such men, their patrons view with disgust and repay with contempt the simulated friendship and ready subservience of these forensic toadies. Another rule recognised by both branches of the profession is that a barrister may not solicit business or in any direct way advertise his desire for employment. Upon his call to the Bar, the aspirant for business takes

some suitable chambers in one of the Inns of Court, and instals therein a youth dignified by the title of clerk to answer for his master whilst he attends the Courts of Common Law or Equity, according to the side of the law he has adopted.

If of the common law, the young barrister joins some circuit and usually selects for attendance some sessions upon that circuit. Should he be fortunate enough, however, to have any connection or prospect of employment in town, he probably neglects sessions and disdains criminal practice, looking for business in the civil courts only.

In these early years, before clients come to himself, the tyro perhaps "devils" for some fortunate brother blessed with a surplus of work, or he enrolls himself amongst the reporters for some legal periodical. If laborious as well as ambitious, perchance he writes or edits a new work on some legal subject, thus combining profitable study with a legitimate advertisement. But such a task must not be rashly undertaken, for should the work prove worthless, the advertisement will be something worse than fruitless. All or any of these courses may be fairly taken to show the desire and capability for work, but a barrister, honestly intending to observe the rules of conduct, allegiance to which, on his call, he tacitly owns, cannot actually solicit the employment he covets.

The position is a peculiar one. Beneath an appearance of indifference, the nice observer of professional etiquette has to conceal real anxiety and often urgent necessity for business. He must also, in pursuance of the same honourable course, maintain a strict reserve in his intercourse with those who practically are the arbiters of his fate. We know upright and learned men who, even under the pressure of great need, have nevertheless acted up to this rule in its fullest integrity, despite the prevalence of contrary example and the promptings of poverty. We must not by any means be understood to approve of an assumption of superiority by the barrister towards his client; any such pretence must be always a breach of good manners, often utterly misplaced.

The great majority of either branch of the legal profession, being gentlemen by both education and position, are as such upon a footing of entire equality; but custom and convenience have imposed certain restrictions upon the intercourse between them. There is a wide distance, and surely some golden mean, between assumption of imaginary superiority and degrading subservience—the former a dire offence against good breeding, the latter fatal to independence and self-respect.

It is, moreover, a rule, not only of the profession but of law, that barristers cannot maintain an action at law to recover their fees; that is, they have no legal claim for compensation in respect of their professional services. The rule is thus laid down in Mr Serjeant Stephen's edition of *Blackstone's Commentaries*:—"A counsel can maintain no action for his fees, which are given, not as *locatio vel conductio*, but as *quiddam honorarium*—not as a salary or hire, but as a mere gratuity."

There is also a solemn decision to the same effect in the case before referred to—*Kennedy v. Brown and wife*. Much laxity as to payment of counsel's fees prevails—we quote a very general rumour—among practitioners of a certain class. Some attorneys, so long as they can find advocates willing to take their briefs without payment of fees, unless in case of success, gladly employ them upon that understanding. So also, it is said, there are members of the Bar too eager for business to be scrupulous as to the terms on which it is given; any such bargain between advocates and their employers is, in our opinion, injurious to the public interests as well as discreditable to those concerned. It is held to be essential to the pure administration of justice, that counsel should not have any pecuniary stake in the issue of their cases, and this exclusion of personal profit is, we think, right; for, were it otherwise, we fear that a direct and selfish interest in their client's success would too strongly tempt many advocates to exceed the powers and abuse the privileges entrusted to them.

So great, indeed, are these privileges, that a strict sense of duty should ever be on the watch, lest in the ardour of forensic



strife their rightful limits should be overstepped. An advocate should never forget that the power to blast a name or to blight a career, when placed in his hands, is entrusted to him solely in the interests of justice and for the vindication of truth. This high standard of conduct is not, however, always maintained; from time to time, no doubt, men of lax principles and practice creep into employment and even hold an extensive business for a while—such men as those referred to by the learned judge already quoted, as “bad men, taking the wages of evil, and therewith also for the most part the early blight which awaits the servants of evil.”

For it is worthy of remark how brief usually is the career, how transient the prosperity, of these professional sinners, and how surely the inevitable Nemesis of dishonour pursues and strikes them down. In some rare instances, however, men of evil repute in the profession gain the front rank and attain to all but the highest prizes. In these cases there must be more than ordinary ability; with such a man, business leads to business—superior skill is gained by experience, and the well-won verdicts tell their own tale at last. Success now brings an abundant harvest, clients who heretofore shunned now eagerly seek him; the great houses of attorneyship retain his services, thence weightier causes and therein more creditable victories ensue. Soon, then, our triumphant advocate, elbowing his way before his shrinking rivals, wrings from its reluctant dispensers the rank which should be also an honour, and unblushingly parades his silken robe as conclusive proof of his own purity and of the malice of his detractors. When opportunity offers he seeks a seat in Parliament, as a stepping-stone to yet higher advancement, and by aid of extravagant promises and impossible pledges perhaps he also gains this object of his ambition. His career is onward still; some minor judicial post probably rewards his ready bluster and faithful vote, but promotion halts there; his antecedents bar his farther rise; moreover, the “House” dislikes the fluent adventurer, and presently rating him at his real value listens coldly to his frequent orations. This is no

overdrawn picture of legal and political advancement; such men have in our own times so risen, and, as close observers of the profession will admit, such men may so rise in future. We may nevertheless hope that in future their success may, as heretofore halt midway, nor ever reach the higher goals of forensic ambition.

Hitherto we have assumed the unscrupulous practitioner to pursue his career with no fouler stain upon his robe than a well-founded imputation of unprofessional conduct and reckless advocacy. We have also assumed him to have escaped any official censure, and that therefore possibly the charges against him and the social slights of his brethren are by the outer world ascribed to a mean jealousy of his fame. The existing impunity of professional misconduct from official censure and correction is perilous to the social position of the Bar, no less than to its utility as an institution; in their own interest, then, as well as in that of the public, whose servants they are, the honour of its members cannot be too jealously guarded. Daily the ranks of the Bar become more thronged, but the increased numbers bring no corresponding elevation in the qualities which alone can win public confidence and respect. The spread of education has of late years brought many men of lower rank into the liberal professions; the law having its full share of this new element. Thus the Bar no longer consists of a comparatively few highly educated men, nearly equal in social position, but of a numerous body, drawn, as we have said, from every grade of life, and embracing every shade of thought and feeling. No spirit of caste can animate or govern natures so diverse, nor can unity of action spring from elements so discordant.

Formerly none ventured to assume the forensic garb unless endowed with means sufficient to enable them to wait with outward patience the coming of their opportunity. But too many now throng the courts who must speedily succeed or shortly starve. Hence of late has sprung up in the junior ranks a disregard for the traditionary rules of their profession,

with a lower tone of bearing, and unseemly intimacy with those whose patronage is a vital necessity. Hence there arises the spirit of advertisement, which in various shapes animates barristers of this class. They have resort to the lecture-room, and, we blush as we write it, even to the pulpit itself, for the purpose of attracting attention and employment to the eloquent lecturer or preacher; while others take to the platform, and lose no opportunity of declaiming on the well-worn topics of political reform or the social and moral improvement of mankind. Fluent speech and pertinacious advocacy are usually the chief, if not the only, qualifications of these gentlemen; by which, nevertheless, they attract a large share of the business of the inferior courts.

Without doubt, a reputation for sound learning, and a character of stainless honour, do eventually contribute to the attainment of the highest positions; but those who dispense the minor business of the law do not sufficiently regard as a disqualification the absence, or even the reverse, of that repute. The character and ability of the advocates who actually do the work of the forum are of deep concern to the public, for it is with the affairs of that public, with their individual rights and wrongs, fortunes, liberties, and even lives, that the courts are daily occupied. If, then, it would be injurious to them that unprincipled or unlearned lawyers should fill the foremost places at the Bar, clearly a graver evil would arise were such an one to gain the Bench, inasmuch as a judge is more potent for mischief than an advocate. We do not believe that in any instance in modern times the English Bench has been so disgraced; but it cannot be denied that at no distant time such an event appeared only too probable.

A bad man of pre-eminent ability as an advocate seemed to have within his grasp a high political office, bringing, in almost certain reversion, a seat upon the Bench. Happily, however, the threatened degradation was averted. Occurrences without the profession brought to an abrupt termination his political career. Official inquiry thereupon ensued, and finally the

damning disclosures thereby elicited stripped the great offender of his forensic robe. The very risk so narrowly escaped of the elevation of such a man should warn the public not to bestow uncautiously their honours and their confidence. Nor is, we regret to say, the personage alluded to a solitary example. Other members of the Bar have, since the extinction of Mr. Edwin James, achieved an equal notoriety, and brought upon their calling nearly equal reproach. In one instance, a protracted inquiry before the benchers of the offender's Inn painfully exhibited the weakness and inefficiency of that tribunal. Since that abortive investigation a considerable period has now elapsed, yet the Masters of the Bench have taken no steps to render their courts more effective, nor has any sign been hitherto given that the much-needed reform is to come from within.

For this neglect grave reproach rests, in our opinion, upon the governing bodies of the several Inns of Court. Containing as they do many members of the legislature, including the law officers of the Crown—the recognised leaders of the Bar—as well as also many distinguished men of judicial experience, a measure for reconstituting their internal courts, and for establishing an efficient control over the conduct of their members, would have emanated with greater authority and propriety from this than from any other source.

Legislative interference on the part of the Imperial Government would, no doubt, be felt by the profession as an encroachment on their privileges, and action taken by an individual member of Parliament to reform the internal tribunals of the Bar is, perhaps, equally liable to be viewed with jealousy by those whose exercise of their authority is thus called in question. We regret, therefore, the inaction of the Masters of the Bench in this respect, as being likely to defeat or impair the utility of any such measure of reform introduced without their sanction.

We do not, however, when suffering from grievous sickness, reject a sovereign remedy merely because the inventor cannot

produce his diploma; so, in the absence of any action on the part of the authorities of the Inns of Court, we hailed with satisfaction the appearance in the last Session of Parliament of Sir George Bowyer's Bill, to enable the Benchers of the Inns of Court to appoint judicial committees in certain cases, and to give the necessary powers to such committees. The merits of Sir G. Bowyer's measure we do not propose now to discuss; in the presence of the absorbing question of last year, it failed to obtain the consideration of the House—such failure being due not to any demerits of the measure itself, but to the pressure of other more urgent matters. The same great question again thrusts aside all minor reforms, and we fear, that if again brought forward in the present Session, Sir George Bowyer's measure will meet a similar fate. But we trust that, during the present year, we may see the settlement of the now urgent if not actually dangerous question of political reform. Then we hope that the Masters of the Bench will not refuse to avail themselves of any opportunity which may offer itself to obtain from Parliament the powers now wanting to give them an effective control over the delinquent members of their Inns.

But increased powers in the hands of the governing body of the Bar will do little to prevent the irregular practices to which we have adverted, unless aided by the expressed disapprobation of the Bar itself. Persistent offenders against its laws and its usage must be taught that, even if they escape official censure, they will not be tolerated as associates by their worthier brethren. In their efforts to purify their ranks, the public opinion of society may greatly aid the action of the Bar.

If the stigma of malpractices extends beyond the limits of the profession and operates as a social disqualification, there will be greater anxiety to avoid the discreditable imputation. The man who cheats at play is, by common consent, driven from society. The dirty practitioner of the courts is also a sort of sharper, and we see but little difference between them. Both abuse the confidence which their position inspires, and, enjoying all its privileges, break for their own profit the rules

of the society to which they belong. We would, therefore, award to each the same penalty—namely, the loss of their social position.

In the absence of any formal promulgation of a code of laws, the judges of the land, the Benchers of the Inns of Court, the courts of the several circuits, every counsel of eminence, may, in their respective spheres, do much towards the better governing of the Bar. Allusion has been made to the courts of the several circuits; these might, perhaps, without much difficulty, be made more effective in maintaining discipline than they are at present. We should mention that these associations are confined to those barristers who attend circuit, the Equity Bar having no similar institution. All the members of a circuit are, upon due election thereto, entitled to belong to the Bar mess, and, upon certain occasions during each circuit, the members of the mess resolve themselves into a court for the transaction of business—at these courts the officers of the circuit are elected, and there taxes are imposed to defray the corporate expenditure of the circuit. There, too, are offences against its laws investigated and punished; for minor transgressions a fine is imposed, graver misdoings expose the culprit to expulsion—the heaviest penalty which the court can inflict. This is a purely social deprivation, excluding from the Bar table, but not affecting the right to practice upon the circuit. But though expulsion from the circuit mess may be said to touch only social position, that disgrace has, without doubt, a serious effect also upon professional advancement. It is, in fact, a public declaration that the offender is a black sheep, whom his brethren have cast out from amongst them. Thus then the circuit courts would seem to offer a convenient machinery for controlling the conduct of those amenable to their jurisdiction. But, in practice, their more serious functions are seldom exercised; no individual likes to come forward as prosecutor, and even when charges are brought forward too often they are allowed to drop; or, if proved, a mistaken pity forbears to enforce the merited penalty. The leaders and officers of the

several circuits would do good service in the best interests of the Bar, by stimulating their courts to greater activity in the investigation and punishment of professional misdemeanours. Let this vigilance be aided by the manifest disapprobation of the authorities, and by the social ostracism of the culprit; those with evil proclivities will then discover that their interest, as well as their duty, lies in the faithful observance of rules and laws binding upon their honour. Finally, we call upon the public, as being most deeply interested, to second the efforts of those who strive to wipe away the reproach which stains the good name and diminishes the utility of a noble calling.

We have endeavoured, in penning these remarks, not to overstate the case as to the present condition of the English Bar; and we are willing to believe that the causes of corruption and decay, to which we have adverted, have not as yet affected the purity and high feeling of the profession as a body; but they exist at its core, and, unless speedily checked, they will deteriorate the whole system.

We also admit that at the present day the judicial body stands deservedly as high in the public estimation as at any period of our history. Never have the true ends of justice been more fairly carried out than by the existing administration of our tribunals. At no previous period have so many eloquent and learned men adorned the courts of equity as may now be found therein; men who are distinguished not only as advocates and lawyers, but also as scholars and politicians. Westminster Hall, at the present moment, boasts no orator as eloquent as the accomplished judge who presides over its highest court, but it possesses a body of advocates whose learning and integrity are justly the pride of the country. We freely admit that upright and able men are abundant throughout all grades of lawyers. Why, then, it will be asked, do we forebode a deterioration of the character and standing of the Bar, and consequently of the efficiency and dignity of the Bench?

We reply that the semblance of vigour and of health is

often seen in the human frame, where decay has already made fearful progress ; but the physician marks the fatal signs, and to him they are eloquent of the canker within.

Any one who has thoughtfully examined the human elements of which the Bar of England is composed, must be sensible that of late years there has been an increase rather in numbers than in quality.

Once more, then, we repeat that there are many already in the legal ranks—and the number is yearly augmented—who cannot be restrained by the discipline of the profession, as at present enforced, from a laxity of practice closely akin to dishonesty. In conclusion, we confidently affirm that the ancient independent spirit and keen sense of honour of the Bar mainly contributed to form the trustworthy and upright judges of whom our history boasts.

We perceive, therefore, with deep regret, the prevalence of a lower tone both of manners and conduct, and we exhort the several grades of the profession to unite in a common effort to check its further decline and to regain its just position in public estimation. Lastly, we call upon the Benchers of the several Inns, as the legitimate guardians of the honour of the Bar, not to neglect the earliest opportunity of obtaining more effective powers for maintaining unsullied their precious trust.

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ART. VIII.—MR. CHISHOLM ANSTEY AND THE  
HIGH COURT OF BOMBAY.

THERE is nothing to be more desired for the good government of our Indian Empire than that the Bench and Bar of the High Courts of Justice in the different Presidencies should be upright and independent as well as able. These courts are in the last resort the sole barrier of the Queen's subjects in India, whether European or native, against fraud and oppression,  
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and to them we have a right to look for the maintenance of a moral rule in a land where corruption and laxity are but too common in every class. We have been, therefore, pained to find that a member of the profession, who has rendered excellent service in the High Court of Bombay, both as an advocate and a judge, has sustained what we cannot help regarding as grave injustice both in India and in this country.

Mr. Chisholm Anstey, when he ceased to be Attorney-General of Hong Kong, joined the Bar of the High Court at Bombay, and quickly obtained there the professional position which his abilities and acquirements so well merit. We believe indeed that Mr. Anstey rose to an undisputed pre-eminence among the advocates of the court, and that when at the height of his practice he enjoyed an income of several thousands a year. It was at this time that Sir Joseph Arnould was compelled to retire temporarily from the Bench, and the strength of the court was thus seriously diminished at a very critical moment; for just then the great bubble of Bombay speculation, induced by the sudden inflation of the cotton trade, was producing a terrible effect. Commercial gambling had become a profession, and the whole population, not excepting (we fear) even the official class, was infected with the plague. As usual, reckless trading was followed by wholesale insolvency, fraudulent bankrupts appeared as the natural representatives of dishonest speculators, and mercantile morality seemed to be disappearing altogether in the general ruin. At such a moment a strong and independent court of justice is the sole sheet-anchor of a community, and it is no wonder that the then Governor of the Presidency, Sir Bartle Frere, was anxious to fill Sir Joseph Arnould's place with the most able and independent lawyer he could find. He offered the post to Mr. Anstey; and when that gentleman represented that he was asked to abandon an income greater than the salary of the judgeship, and to give up a permanent practice for a temporary appointment, Sir Bartle Frere, we believe, replied that the interests of the community were at stake, and that he must

press the acceptance of the office on Mr. Anstey as a public duty. Mr. Anstey with great disinterestedness then accepted the temporarily vacant judgeship, and entered at once upon its labours. We know we are correct in saying that the greater part of the work in the Court devolved on his shoulders; it was work at that trying time of a peculiarly harassing nature; it was a post from which many would have shrunk, and where most men would have broken down. A less energetic man than Mr. Anstey would have succumbed to the labour; a less courageous would have quailed under the obloquy. Mr. Anstey, though in weakened health, fearlessly worked on, exposing fraud, punishing criminality, enforcing the supremacy of justice with a vigorous hand, and (no doubt) a trenchant tongue, which scorned conventionality and spared no offender. Of course such a man made enemies. If the uprightness of Aristides became wearisome to the Athenians at the best period of their history, how painfully out of place, nay, how unutterably execrable, must a just judge have appeared to the "financing" schemers of Bombay. No wonder they adopted the modest expedient of petitioning the Governor for Mr. Justice Anstey's removal, though what they expected to gain by this unprecedented step it is difficult to conceive. What they probably did not expect was, that Sir Bartle Frere, moved to an indignation that does him honour, returned to the petitioners the answer which we subjoin. This official document is a remarkable testimony to Mr. Anstey's services, and as such we have much pleasure in bringing it to the notice of the profession.

But a serious question remains behind. By the self-sacrificing course he pursued, Mr. Anstey lost his practice; and on the return of Sir Joseph Arnould to India he ceased to be a judge. One would have imagined that the earliest opportunity would have been seized by the Government to compensate him for the loss he had sustained in doing a great public service. We have reason to believe that both Earl de Grey and Viscount Cranborne, when at the India Office, acknowledged the importance of Mr. Anstey's exertions at a critical time, and

recognised his claims to a judicial appointment at the earliest available opportunity. We can hardly credit the rumour which has now reached our ears, that Sir Stafford Northcote, the present Secretary for India, repudiates this obvious obligation. Surely, if it be desirable to encourage a high tone in the Bar of India, no occasion should be lost of recognising that kind of merit, not very common in the East, which holds public duty superior to pecuniary considerations. Surely, if the Bench of India is to be truly independent, free from the imputation of subserviency of any sort, it can hardly be wise to officially ostracise a man who has shown himself proof against a flood of social corruption.

We must venture to express our hope that if the India Office does not see fit to appoint Mr. Anstey to a High Court Judgeship in one of the Presidencies, the Lord Chancellor will take care that that gentleman does not suffer permanently for his good conduct. We are convinced that Lord Chelmsford must, of all men, be capable of appreciating the integrity and independence which Mr. Anstey has so signally exhibited; and some practical confirmation of Sir Bartle Frere's eulogy would come from his lordship's hands with equal authority and fitness.

**MINUTE** by His Excellency the Governor (in Council) of Bombay, dated 22nd January, 1866, on the Petition from Sir Jamsetjee Jeejeebhoy, Baronet, and others, praying for the removal of Mr. Justice Anstey from the Bench of the High Court.

" 1. I have received this Petition with very great regret, a regret which has increased the more I consider all the circumstances connected with it.

" 2. That any large number of the inhabitants of Bombay should consider it necessary to meet together to protest against the continuance in office of a judge whom this government had selected to sit on the Bench would, of itself, be to me a source of sincere regret, and this feeling would be increased by finding, as in the present case, attached to the protest the names of several gentlemen for whom I

entertain a most sincere regard and respect, and who, I feel assured, would not have taken part in any such measure but from what they considered an imperative sense of public duty.

" 3. Nor would my sorrow be lessened by finding that in the manner, no less than in the substance, of their address they had departed widely from those rules which have for ages guided our own countrymen, when appealing against the decisions or challenging the conduct of judicial officers.

" 4. It appears from the published accounts of the meeting at which this address was adopted, that the meeting was convened at a private house, without any public notice of the precise object of the meeting, and that the petition was produced ready drawn up, adopted, and signed, without preliminary discussion, and without even the form of framing it, so as to accord with any views expressed at the meeting.

" 5. It is not thus that Englishmen are wont to proceed in so momentous a step as that of publicly impugning the character of a judge; and I on this account especially regret that the memorialists were so ill advised as to separate themselves on this occasion from their European fellow citizens; for I am confident that any Englishman, however little experienced in the usages of public meetings and movements like the present one, would have pointed out to the memorialists that if they wished due attention to be paid to their appeal as a public expression of the general sense of the community, the meeting should have been convened with clear public intimation of its object, full discussion should have been permitted of the steps proposed, and the address should have been framed so as to bear at least the appearance of being the result of the meeting rather than the cause of its being convened.

" 6. Had this course been adopted, it could hardly have failed but that some one would have pointed out to the meeting that to condemn a judge for any cause save for some form of incompetence, for wilful violation of the law or for corruption, was a course unheard of and practically impossible in England; and that to pray for the removal of a judge, whose tenure of office was expected under ordinary circumstances to expire in a few days, must give to the request the appearance either of unreasoning panic or of vindictive feeling rather than of a public and deliberate verdict of a large section of the community.

" 7. These circumstances would of themselves have prevented my regarding this petition with the deferential consideration I should wish to pay to any genuine spontaneous deliberate expression of opinion from gentlemen so highly and justly respected as many of the subscribers; but it is not the less incumbent on us to consider the gravamen of this impeachment.

" 8. It is alleged that the judge is guilty of extremely harsh and insolent treatment of suitors and witnesses, and punishing by fines and imprisonment for trifling causes, of violence of temper and eccentricity tending to produce and actually producing a failure of justice—by deterring suitors from pressing their claims in court—by terrifying, especially solicitor's clerks, and by rendering, even European gentlemen who practise before him, reluctant to appear in court.

" 9. That he is not the person to be entrusted with the administration of the new Civil Procedure Code, owing to his unreasonable rigour in applying its provisions with the avowed determination of forcing on the reorganization if not the total repeal of the Code.

" 10. That he has contracted a prejudice against the native community as a body, and against educated natives in particular; that he is swayed by personal prejudices; that in criminal cases he exhibits an unseemly desire to secure a conviction, and that his punishments are often unusually and indiscriminately severe, and sometimes accompanied by unseemly and unnecessary remarks on parties not before him.

" 11. Had the subject of the petition been publicly discussed in a manner befitting its momentous object, such discussion could hardly have failed to recal to the minds of English lawyers, Bar-traditions of some of our greatest judicial authorities, the lustre of whose fame has been dimmed by defects of temper, by an almost vindictive application of harsh laws, and by habitual imperiousness towards the Bar, at least equal to anything alleged in this petition. But no external advice would, I think, have been needed to convince the subscribers, that harshness and violence of temper and expression, and a habit of punishing with the utmost rigour of the law, but always within the law's limits, are scarcely grounds on which to pray for the removal of a judge, whom his greatest enemies must admit to be learned, able, independent, and of unimpeachable integrity.

" 12. It is impossible to test the degree of weight to be attached to many of the statements in the petition, nor could any inquiry we can make test the exact effect of manner or temper, apart from more cogent considerations connected with the nature of cases, or with the character and circumstances of parties. It is quite possible that some of the statements as to parties being deterred from appearing before so severe a judge, may be true, without supposing that the terror so inspired was altogether unfavourable to the ends of justice.

" 13. Others of the statements are so absolutely incredible, that I cannot but think the memorialists have been misinformed. I have too great confidence in the courage and independence of the Bar to believe that any barrister would be deterred from appearing in what he believed to be a just and righteous cause, merely from fear of being browbeaten, and no such avowal of any intention to procure the repeal of the Civil Procedure Code, as is alleged in the petition, could possibly, I think, have been declared in the manner, or with the intent alleged. The great body of the memorialists must necessarily have taken these and other statements on trust, and it is far more likely that they should have been misinformed, than that the English Bar should forget its duty, or that an English judge, so mindful as Mr. Anstey has always shown himself of the traditions of Westminster Hall, should forget the very first and most universal principle which separates the judicial from the legislative function, and which is ever on the lips of an English judge, when, as must so often happen, he is bound to administer a law which he would, if a legislator, desire to modify.

" 14. There is one important charge, regarding which I am convinced that the memorialists do Mr. Anstey grievous injustice, and that is, where they assert that he has contracted a prejudice against the native community as a body, which operates to their disadvantage when appearing before him in court.

" 15. Whatever else may be said or thought of Mr. Anstey, there can be no doubt that an irrepressible and inextinguishable hostility to every form of apparent oppression or injustice, a determination, no matter what the personal sacrifice, to protect the weak against the strong, is one of the most marked and invariable characteristics of his long public career, and I feel assured that, as far as any prejudice may

exist in his mind, it is certainly not against the native community as a body, so as to act to the disadvantage of members of it, when seeking to get justice before him for themselves or others.

“ 16. It may be an accidental irrelevance which adduces as an illustration of his bias against natives, a case in which he is apparently charged with allowing his feeling against an European solicitor to influence his judicial conduct. But even if the case applied, or were capable of test, no single case, however strong, could prove a charge of habitual prejudice against natives of India, when opposed to the evidence of a long lifetime, during the whole of which he has been more before the world, and more exposed to the most searching public and unsparing criticism than any man in India : and I could, if it were necessary, refer to cases which occurred very lately, before he took his seat on the Bench, in which Mr. Anstey allowed no personal considerations of pecuniary or professional loss to himself to prevent his taking up the case of a native previously quite unknown to him, but who he believed had been wronged by Europeans in authority. The confidence which the natives felt in him as a fearless and unflinching advocate of their rights was shown by his enjoying the best practice at this bar up to the day he took his seat on the Bench ; and I feel quite certain that, if the memorialists individually, or in a body, were to be threatened to-morrow with any measure of high-handed tyranny, they could not in the whole Indian Empire, find a more certain, ready, or energetic advocate of their rights, than the man who they have been told entertains a general and indiscriminate prejudice against their whole community.

“ 17. After the most careful consideration of this petition, I confess I am at a loss to know what possible action the memorialists expected the government to take upon it. The meeting was held on 16th December, and the petition ready drawn up, was on that day numerously signed. It was not however sent in to government till the 30th December, and, partly owing to my unavoidable absence from Bombay, did not actually reach my hands till Mr. Anstey had ceased to sit on the Bench, in consequence of Sir Joseph Arnould's return.

“ 18. Between the 16th and 30th there was ample time for every one, who desired to do so, to sign the petition. I find that of the 2,662 names appended to it, 1,278 appear to be those of Parsees,

1,191 of Hindoos, and 191 of Mahomedans, none of Europeans or East Indians, and only one Portuguese and one of the Jewish community.

“ 19. After making every allowance for the absence of the names of officers of government, of barristers, and others who from special circumstances may have been prevented from expressing their opinion, surely the memorialists themselves can hardly expect us to regard a petition so signed as adequately representing the general sense of the community.

“ 20. But what do they ask us to do? They pray us to remove from the Bench, an able, laborious, learned, and incorruptible judge, on account of alleged want of temper, courtesy, and discretion : they ask us to do this the very day his tenure of office naturally terminated. I feel assured that, had time been allowed them for reflection, the memorialists themselves would have seen the false position in which they placed themselves, by preferring to government a request compliance with which was simply impossible, even had the charges they brought forward been such as if proved would have justified any English government in directing the removal of a judge from the Bench.

“ 21. Moreover, the memorialists would surely have seen on reflection that if a community is justified in preferring such a request or a government in complying with it on such grounds, a case at least as strong would exist, where undue clemency had been shown, and that if such a demand could properly be made by a community publicly assembled for the removal of a judge, who administered justice with too little mercy, a similar demand might be made with much greater force and propriety in the case of a judge who showed mercy with what the public might think too little regard for strict justice.

“ 22. Again, if they who object to a judge's manner, temper, or prejudices, are justified in meeting together to make a public demand for his disgrace and removal, it is at least equally justifiable for those who do not object to him for such reasons to meet also to support him. I feel assured that there are few of the memorialists, who signed this petition with a full sense of its import, who could contemplate without dismay the possibility of the judicial office being thus held subject to what the public opinion of the day might think



suitable, apart from the intrinsic considerations of the honesty, independence, and legality of a judge's proceedings.

" 23. It is indeed so obviously dangerous to the interests of justice to comply with any demand for the removal of a judge, for any cause save for incompetency, corruption, or wilful denial, or delay of justice according to law, that it would be far more probable that any government would continue in office a judge whom they might otherwise desire to remove, rather than that it should be supposed that they had removed the judge in accordance with the popular feeling of the moment.

" 24. For all these reasons, I should have felt inclined simply to acknowledge the receipt of this petition, trusting that time and reflection would show the memorialists that they had asked what was in itself unreasonable, in a manner and at a time which made compliance with their request impossible; and that the manner, the time, and the substance of their request alike prevented government from giving to their memorial the weight we should otherwise wish to attach to any representation which came before us with so many respectable signatures. But it is, I think, due to the memorialists, no less than to Mr. Anstey, that we should leave no room for possible doubt as to the view we take of their request, and, if my colleagues concur with me in this opinion, I would propose that a reply should be sent briefly embodying the views I have above stated.

" 25. These papers will, of course, be transmitted to Her Majesty's Secretary of State. In doing so, it is only just to Mr. Anstey that I should record my conviction that he has done important service to the cause of justice during his tenure of office. It is not necessary to undertake Mr. Anstey's vindication from the imputations of undue warmth of temper or unreasonable force of expression which form so much of the substance of this petition. Had Mr. Anstey's command of temper and his discreet care of what was most for his own advantage been as conspicuous as his ability, it would probably never have fallen to the lot of any government or community out of England thus to criticise the proceedings of one whose talents, learning, and fearless determination to do his duty, would have adorned even the English Bench in its best days.

" 26. But I would not be understood as implying that any of these alleged defects have neutralised the good Mr. Anstey, I am sure,

desired, and I believe to a great extent succeeded in effecting. He fell on times quite unparalleled in the history of this, or, I believe, of most other courts and communities ; when the course of justice was impeded by the mere mass of the work thrown upon the court, and when the vastness of the calamity which had fallen upon the whole mercantile community tended to obliterate the usual landmarks of right and wrong, and to produce a general disinclination to judge or act strictly, which greatly aggravated the difficulty of enforcing rights by course of law.

" 27. Under these circumstances, the accession to the Bench of a judge so laborious, learned, and inflexible, afforded the court that kind of aid, without which it might have struggled long to master the business before it, in any mode which should have made men feel that the High Court was something more than a mere court of arbitration and adjustment, with but little practical power to do anything beyond giving legal effect to the voluntary arrangements of parties. I am assured, on evidence which I cannot doubt, that many a just claim which would otherwise have been irrecoverable has been at once satisfied, under the wrong-doers' dread of appearing before a judge so keen and inflexible, and I have no doubt in my own mind that his presence on the Bench, during the past few months, has tended greatly to maintain strict and regular procedure in the Court, and has materially aided the Court in the arduous task which but for his assistance it would have been very difficult to perform. To render this service Mr. Anstey sacrificed, I believe, the largest and most lucrative private practice at the Bar ; and this sacrifice and these services constitute, I conceive, a substantial title to the gratitude of the government and community, which it would require something more than infirmity of temper to neutralise.

H. B. E. FRERE.

NOTE.—Since the observations which precede the above minute were written, a letter has happened to come into our hands which contains a remarkable confirmation of the opinion we have expressed of Mr. Anstey's conduct as a judge. The letter was written by a merchant in Bombay to his London correspondent, and the writer, after alluding to the deplorable mercantile condition of the community, in which " everyone now-a-days seems to be either a swindler or a bankrupt," and after mentioning Mr. Anstey's departure with regret, says, " We would be delighted to see him return to Bombay. Had he remained here, there would not have been one-tenth of the bankruptcies recorded which have been since he left ; he was a terror to swindlers and rogues of every degree, and greatly they rejoiced when he left Bombay."

## ART. IX.—THE LATE MR. JUSTICE THOMSON.

IN the *Law Magazine*, No. 44, we acknowledged the receipt of the early copy of the *Institutes of the Laws of Ceylon*, by Mr. Justice Thomson, and promised in a future number to notice the work at length. When that paragraph was penned, Mr. Thomson was in England on leave of absence. He returned to Ceylon in November, and died suddenly, shortly after his arrival, on the 4th of January of this year.

Henry Byerley Thomson was a son of the late Dr. Anthony Thomson. He was educated at King's College, London, and Jesus' College, Cambridge. On May 14, 1849, he was called to the Bar by the Honourable Society of the Inner Temple. When Lord Stanley became Secretary of State for the Colonies, Mr. Thomson was appointed Queen's advocate of Ceylon, and, on the first vacancy, he was elevated to the bench. Mr. Thomson was the author of a work on *The Choice of a Profession*, and of *The Laws affecting Shipping and Commerce*. But his most important work is that now before us. It is scarcely possible to over-estimate the value of that labour of which three volumes are the result. When it is stated that till their publication the legal profession of Ceylon was in possession of no single text-book of the law as administered in their colony, no one will deny the vast service Mr. Thomson has performed. Compounded as the law is of the Roman-Dutch law, equity, and portions of English common law, a legal practitioner required, for the successful discharge of his duties, a composite library difficult to obtain, and difficult to master when obtained. The *Code Napoléon* having been introduced into Holland in 1811, there had been, with the exception of two or three translations, no publications on Roman-Dutch laws since that period; consequently, books on that subject

have gradually become more scarce, and are daily becoming more costly. It is true, that since the charter of justice was granted to Ceylon, the supreme court has, by its decrees, been now for forty-three years declaring the laws of the colony; but the profession generally were unable to profit by decrees which, with trifling exceptions, have been left unprinted. The state of things that followed may be imagined. The absence of a complete publication has led to error and litigation. The supreme court has had to decide the same points, often elementary points, over and over again, because the district judges, magistrates, advocates, and proctors have had no proper reports to refer to for guidance. Even the supreme court, having no index to its own decisions, have elaborately adjudged many questions of law, ignorant that those very questions had been as elaborately adjudicated upon years before by their predecessors or have unwittingly overruled those predecessors and themselves!

It was with full knowledge of the multiform and inevitable evils thus inflicted upon the colony that Mr. Thomson undertook the compilation of the present work.

There are, it seems, in Ceylon no periodical reports similar to those published in England. The law laid down by the supreme court has hitherto been partially made known to the public by limited collections of decrees copied from the records of the court, and unaccompanied (save in one instance) by any report of the arguments of counsel.

The first of these collections is that of Sir Charles Marshall, late Chief Justice of Ceylon, and known as "*Marshall's Judgments.*" It includes only decrees pronounced between the 1st of October, 1833, and March, 1836; but it is especially valuable on account of its excellent arrangement, and the learned and lucid comments passed by that able judge upon the decrees contained in it—comments that have always been treated as of high authority by the supreme court.

Another compilation is the "*Digest of the Decisions of the*

Supreme Court, from 1833 to 1842, compiled conjointly by Messrs. Morgan, Conderlag, and Beling," commonly known as *Morgan's Digest*. This book is a compilation of all decrees deciding any point of law between those dates, with marginal notes and an index.

From 1842 down to the present time there has been no full printed publication of the decisions of the supreme court. Isolated collections of cases have been published, such as Mr. Lorenz's "Reports for 1856;" Mr. Nell's "Collections of Decisions in Appeals from the Courts of Requests down to 1855;" Messrs. Beling and Vanderstraaten's "Collection of Police Court Cases," and Mr. Austin's "Collection of Cases relating to the District Court of Kandy." An attempt has also been made to publish recent cases in a periodical publication, termed *The Legal Miscellany*; but the mode of publication has, up to the present time, left the different portions of its plan incomplete and difficult to refer to.

It will be seen from the above extract that, with small exceptions, the decrees on appeals from the District Courts to the Supreme Courts, for a period of twenty-four years, were unavailable in any public form. The present work does not, however, only make accessible this body of decrees, but furnishes us with a republication of those which have already been published, but are out of print, or are so scarce as to be almost unattainable. In a word it supplies the legal profession, in a condensed form, the law as it is now administered in Ceylon.

The first book comprises an introduction, describing the relation of Ceylon to Great Britain—prerogative in the colony its royal revenue, and the civil and criminal jurisdiction and practice of its courts. In the second is given an account of the civil jurisprudence of the island. In the third the author treats very clearly of the native laws. This arrangement is doubtless in some degree defective. Each volume, however, may be considered as complete in itself, the first being devoted

to prerogative, revenue, local government and practice; the second to the principles and practice of Roman-Dutch jurisprudence.

The Roman-Dutch law, the basis of the law of Ceylon, is composed of the civil law and of such ordinances and edicts as the supreme authority in Holland from time to time enacted. "It is founded," says Mr. Thomson, "upon such admirable principles that much of it remains unaltered, and it contains, as portions of its very frame, many of those 'improvements' which English law reformers are arguing for, and which are so reluctantly accorded. Thus, there is a complete and intimate union of law and equity under that law; and every court in Ceylon is a court of both law and equity, and decides every question before it on the principle of equity when applicable. Again, there is no distinction between real and personal property, except as to the form of the conveyance; and, consequently, both kinds of property pass to the executors or administrators, and not to the heir; and both real and personal property are liable to be taken in execution in a given order." It appears, too, that in Ceylon no jury is necessary in civil cases, consequently, justice is not defeated by the absence of material witnesses at critical points in a trial, as the Court can, under terms, always allow a party time and opportunity to bring his whole cause before the Court. There is, moreover, no distinction between felony and misdemeanour. Other points well worthy the attention of English law reformers are mentioned by Mr. Thomson in his preface. Under the English law, the person who can first snatch a judgment is entitled to execution against all property subject to such process; but by the Ceylon law all other creditors are entitled to concurrence, that is, to share with the judgment-creditors proportionally to their claims.

The occurrent claims are proved summarily, and, unless disputed, are at once allowed. Another feature of this law is the power of placing the property and even the persons of prodigals (that is persons scandalously wasting their property)

under the care of curators. In the law of Ceylon, the English mortgage, which conveys the legal estate to the mortgagee does not exist, but is replaced by a simple deed of hypothecation which has the effect of tacking the debt to the property, so that a creditor obtains a right to follow it through whatever hands it may happen to pass, and may obtain a decree for its attachment and sale in satisfaction of and discharge of the debt; so that "by a very simple deed the Ceylon mortgagee obtains all the advantages of the English mortgagee with but one exception, that the Ceylon mortgage in general gives to the mortgagee no power of sale on failure of interest or redemption, but he must foreclose in a court."

One of the most peculiar features of the Roman-Dutch law, is the relation of husband and wife. The wife is personally looked upon as a minor, and is, in liberty and in the disposal of her property, as completely subject to her husband as in England; nevertheless, as regards property, she and her husband are in the light of partners. Man and wife have no separate property, so that when a dissolution of marriage takes place by the death of one of the spouses dying intestate, the surviving spouse is bound to surrender one-half of the remaining property to the representative of the deceased.

Such are some of the peculiarities treated of in the book before us. The volumes are not only indispensable to every legal practitioner in the colony of Ceylon, but will be found highly interesting to everybody who feels interested in the science of jurisprudence. Since Ceylon has been in the possession of this country, no greater boon has been conferred on the colony than Mr. Thomson has conferred on it by the publication of these "Institutes."

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## Notices of New Books.

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[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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Report of the Working of the Mines' Inspection Act (23 & 24 Vict. c. 151) for the South Wales District for the year ending 31st December, 1865. By Thomas E. Wales, Esq. 1867.

It appears from the census of 1861, that there are no less than 282,473 male persons employed in working the coal mines of Great Britain. In the year 1865, it is computed that 98,911,169 tons of coal were raised at a loss of 984 lives. These statistics show that in Great Britain there is a life lost for every 100,519 tons of coal that are raised. With all the means that modern science has placed at the disposal of the men for their protection while engaged in their dangerous employment, this average of mortality is far greater than it ought to be. We have read with pleasure Mr. Wales's interesting and able report for the South Wales District for 1865. Almost every fatal accident to which he refers is not to be attributed to the existence of any necessary danger in the work, but to gross negligence on the part of the men or of their employers. The 23 & 24 Vict., c. 151, has, without doubt, worked well. We think, however, that the powers of the inspectors ought to be increased. It is necessary, too, that they should be able to press their complaints against colliery proprietors before other tribunals than those of justices of the peace. Colliery proprietors, it must be remembered, are men of great influence and power in their districts. Not only the unpaid justices, but also stipendiary magistrates in their immediate neighbourhood, are awed by their wealth and grandeur. The first accident to which Mr. Wales refers illustrates our point. An explosion occurred in a colliery belonging to the Marquis of Bute, in the Rhondda Valley, in which the "four feet coal" was worked—a vein proverbial for the large quantity of gas it gives off. It was shown that an accumulation of gas was allowed to remain in a certain part of the mine—the existence of which was known—and that this gas getting ignited by the dangerous practice of firing shots, four men were killed. Mr. Wales instituted proceedings against the colliery managers before the magistrates, but they dismissed the case, "one of them being," as Mr. Wales observes, "an owner of collieries in the adjoining valley."



An explosion, which took place in the Cwmaman pit, would go somewhat to explain the mystery that hangs over the explosion in the Gethin pit on December 20th, 1865. The former pit was worked with locked safety-lamps. On the morning in question, a boy fifteen years of age, was going hurriedly up a cross heading and past a stall out of which gas was escaping. The gas ignited at his lamp, although found locked and in proper condition. The boy survived the accident one day, and stated that the gas fired at his lamp. "This," says Mr. Wales, "is the only clear case which has come under my notice, where gas has been ignited by a proper safety lamp, and goes to prove the great danger of allowing men either to work or pass even with safety lamps where it is known the air is charged with gas."

By the explosion in the Gethin pit, thirty-four men were killed. There had been an accumulation of gas in a stall discovered previous to the accident, and the usual danger signals had been put up. The explosion occurred by the firing of the gas in this stall, but how it was fired must remain a mystery. A couple of days after the explosion, the lamp of David Biddoe, the acting overman, was found in this stall properly locked. His body was discovered at some distance in another stall. A witness stated at the trial that took place before Mr. Justice Blackburn, on an indictment against the managers for manslaughter, that it would have been possible for David Biddoe to have seen the gas firing in his lamp, and to have ran to the place where his dead body was found. It was suggested that he had gone into the stall to test the thickness of the pillar of coal by listening while a collier knocked at it in another stall. Mr. Wales does not seem to accept this as an explanation of the mystery, chiefly because the lamp in the stall was found locked and uninjured. But if the gas fired at a locked safety-lamp at Cwmaman, the same would happen at Gethin. It was proved at the trial that Biddoe's lamp was not a very good one, and that it could be opened without a key by simple shaking. If this is not the true explanation of the Gethin explosion, it is the only plausible one that has been suggested. After a very long trial both the colliery managers were acquitted.

Mr. Wales's report contains many valuable suggestions which in the interest of humanity we hope will meet with prompt and earnest attention from the Government.

**The Law and Practice of Bankruptcy, with an Appendix of Statutes, Orders and Forms.** By William Downes Griffith, Esq., Her Majesty's Attorney-General, Cape Town; assisted by Charles Arbuthnot Holmes, Esq., Barrister-at-Law. London: Sweet. 1867.

THE appearance of a new and most complete work on the Law and Practice of Bankruptcy is not calculated to give much encouragement to those who hope, as is the case with lawyers and traders generally, for a great and speedy change in the subject of it. At all events the authors, who are evidently good authorities, do not

suggest in their respective prefaces any fear on their part that their great labours may have been in vain. Nor are we, for our own part, inclined to think that this work will be rendered even partially, far less entirely, obsolete for a long time to come. The attention of the country and of parliament seems to be taken up so entirely by one great topic that the less interesting, though possibly somewhat more useful, subjects of reform in the administration of the law—matters almost without number, which have for years called loudly for real and earnest attention—are constantly being shirked, postponed, or got rid of for a time by half-treatment. This work, therefore, which has been most carefully and fully prepared, is to be recommended, not only for its own merits, but as a high authority upon a most difficult and complicated branch of Law and Practice, which has, however, by this time been settled and fixed to a very great degree, and is not yet likely to undergo any very important changes. The labour of preparing so full and elaborate a work on such a subject must have been enormous, and has been most successfully bestowed; it has, in fact, produced a standard work. We only wish that we could have added that upon the Law and Practice of Bankruptcy the production of a standard work is as yet premature.

**Precedents—Pleading with Copious notes or Pleading Practices and Evidence,** by the late Joseph Chitty, Jun., Esq. Third Edition. By the late Tompson Chitty, Esq., by Leofric Temple, and R. G. Williams, Esqrs., Barristers-at-Law. In two Parts. Part I. London: Butterworths, 7, Fleet Street. 1867.

THE publication of the third edition of this well-known book on Pleading has been delayed by the long illness and subsequent death of Mr. Tompson Chitty. In completing the portion of the work left unfinished by him, the editors have endeavoured to carry out his views. The value of this practical work has greatly increased in their able hands. It is not a book that gives much scope for the hand of the reviewer; it is framed solely with the view of being a safe and ready guide for the practitioner in the art of Pleading. The notes are concise and suggestive, and almost every precedent is accompanied by a list of the cases supporting it. The precedents themselves give abundant proof of the learning and care that have been devoted to them. Part the first brings us down to the end of Pleas in Contracts. We hope that the remainder will soon be published. When it is finished, the work as a whole will, without doubt, be the best and most complete work on Pleading in our libraries.

**The Elements of the Law of Contracts.** By Stephen Martin Leake, of the Middle Temple, Barrister-at-Law. London: Stephens and Sons, 26, Bell Yard, Lincoln's Inn. 1867.

THE announcement of a work on the Law of Contracts by one of the authors of Bullen & Leake's *Precedents of Pleadings* naturally

created considerable interest. The deservedly high position of that admirable work, which has passed through three editions in little more than the same number of years, promised value in any work from the same hands. The expectation cannot be said to be disappointed in the appearance of a book of high excellence. Yet it does not altogether fulfil its high aim. The intention of the author is to produce a work bearing the same relation to other works on the same subject, that Best does to *Taylor's Evidence*, by exhibiting the elementary rules and principles of the law of contracts and exclusively of the detailed application of that law to specific matters "the application being kept merely subsidiary to the main object of the work" the exclusive object being that of treating of the law of contracts in its general and abstract form, apart from its specific and practical application. In studying this work, which if we are not mistaken is the product of the hands of a highly philosophic character and with great powers of logical arrangement, we see as we believe the foundation of a classical treatise on contracts. At the same time we are more than ever convinced of the immense difficulties in the way of constructing great general principles, in an abstract form, from the great concrete of cases and decisions with which our law is enriched, and at the same time encumbered. The see-saw of principles, and their exceptions so evenly balanced, has been too much even for our author, and it will require yet some careful study and revision before this book is altogether worthy either of his abilities or the high stand-point he has assumed. For he sometimes falls into the very pitfalls he shuts with the intention of avoiding—detail and repetition. Thus at page 44 he quotes a case in these words—"But where the plaintiff's goods were seized for a distress for the defendant's rent, and sold by the landlord under the distress, it was held not to be equivalent to a payment of money by the plaintiff so as to entitle him to charge the defendant with money paid to his use." This is under the head of "Payment under a distress for the rent of another." And at page 47, under the head of "Payment must be of money or its equivalent," the same sentence, almost word for word, occurs. Again at page 56, under the head of "Voluntary payment of unfounded claims," the same principle, almost in the same language, is enunciated at the close of the paragraph. On page 59, under the head of "Money paid under a mistake," a similar want of thorough revision and condensation is apparent. In pages 372 and 374, where more than a page is taken up with the case of *Barkwith and Gay*, the quotation in the former page is really all that was required more than a mere reference. We will not pursue these minor blemishes, for we are sure that more time and study on the part of the author is alone wanted to ensure even a more skilful regrouping than at present adopted, which would in a more condensed form still give us the great general principles of the Law of Contracts. The whole work is arranged under six heads. The formation matter, discharge and assignment, with the parties to and damages incident to breach of contracts—these are subdivided so as to exhaust the subject. We subjoin one sentence from the intro-

duction defining contracts, as a fair specimen of the great clearness and ability shewn by the author. "The classes of rights distinguished as arising *ex contractu* and *ex delicto* may respectively be represented in the English law with sufficient accuracy by the expressions—rights arising from contract and rights of action. The term contract in the English law is used with a meaning wide enough to include the sources of all the rights against the person which have been described as primary, in contrast with those described as secondary or remedial. It is also used, and perhaps more accurately, to denote the legal rights themselves which spring from those sources—in the latter sense, like the term *obligatio*, it is used to indicate not only the bond of law arising between and connecting the two parties to the contract, but also, as occasion requires, the right on the one side and the legal duty or liability on the other, which are comprised in the contract."

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*Books Received.*

On Parliamentary Government in England. By Alpheus Todd.

Vol. I. Longmans, Green, and Co. 1867.

The Metropolitan Poor Act, 1867. By R. Cecil Austin. London :

Butterworths. 1867.

Explanation of his design for the proposed new Courts of Justice.

By George Edmund Street, A.R.A. 1867.

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## Events of the Quarter, &c.

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### THE JAMAICA PROSECUTION.—MARTIAL LAW.

THE Lord Chief Justice of the Queen's Bench sat on Wednesday, April 10th, at the Old Bailey Sessions House, to charge the Grand Jury in the matter of the indictment for murder arising out of the Jamaica riots, against Colonel Nelson and Lieutenant Brand. The learned judge in commencing his charge referred specifically to the terms of the indictment, and gave an historical account of the colony of Jamaica from the time of its conquest in 1655. His lordship then proceeded to consider of what class the colony was, whether a Crown colony as distinguished from a settled colony, and having disposed of that part of his charge, spoke as follows on the subject of martial law:—

“And more especially is it important that we should ascertain, if we can, whether the Crown has power, and whether a representative of the Crown in our colonies has power to establish martial law, and all-important it is to ascertain what this martial law is. Of late, doctrines have been put forward which are to my mind of the wildest and most startling character—doctrines which, if true, would establish this: that British subjects, not ordinarily subject to martial law, may be brought before tribunals armed with the most arbitrary and despotic powers—tribunals which are to create the law which they ought to administer, and are to decide upon the guilt or innocence of persons brought before them, with a total abandonment of all those rules and principles which are the very essence of justice. We find such doctrines as these. It is said—‘martial law is arbitrary and uncertain in its nature, so much so that the term “law” cannot be properly applied to it.’ Again, it is said—‘when martial law is proclaimed, the law is the will of the ruler, or rather the will of the ruler is law. Again—‘martial law is suspension of all law, and is the will of the military commanders entrusted with it, to be exercised according to their judgment, and the exigencies of the moment and the uses of the service, that no fixed or settled rules, no definite practice can bind it.’ And lastly, we find in print this startling proposition, that ‘when martial law is proclaimed there is no rule of law on which the officers executing martial law are bound to carry on their proceedings. It is far more extensive than ordinary military law; it overrides all military law.’ These being the doctrines propounded by persons of some authority and some education,

I think it high time that they should be brought to the test of judicial examination. At all events, of this I am sure, if that be the system under which British subjects can be treated as to their liberties and their lives, it is time Parliament should interpose and put some check upon a jurisdiction so purely arbitrary and despotic as that pointed out by those writers and authorities to which I have referred. The difficulty we have to deal with in this case is that for the explanation of these statements, and of such law as this I can find no authority. They seem to me, I must say, as unfounded and as untenable as, in my judgment, they are mischievous—I will almost say detestable. We should see whether they rest upon any solid or firm foundation; and I confess that I am unable to find that such doctrines are to be considered part and parcel of the law of England. And we ought to see that there is sufficient authority for the assertion that British subjects can be subjected to treatment in this way. Never forget that whatever may be the charge of which a man is accused, although he may be a rebel, although he may be the worst of traitors ever brought to the block, yet until he is convicted, until his life is taken, he is still a subject, and is entitled when brought to justice to all those safeguards which are of the essence of justice, and which have been found by experience to be necessary to prevent rash and hasty judgments, which even men experienced in the administration of justice are at times too apt to pronounce, and to prevent sometimes that innocence which has the appearance of guilt from being treated as although the guilt were actually established; to prevent innocence from being confounded with guilt, and an innocent man from being destroyed, more especially in times of excitement and passion. In the first place, let us consider whether there is such a thing as martial law in the sense in which it is generally used. Following this difficult and important subject, I think it is impossible to do justice to it without endeavouring to trace it back to its foundation, to see when it originated in its application to civilians, and when, and where, and how it has been exercised. I cannot but think that the case is only capable of solution in this way; and in order to get to the bottom of the subject, it is necessary carefully to trace in all its phases the history of the military law of this country, and I do this, partly to satisfy my own mind, partly to do my duty to you, and partly from a belief that it is of the last importance that we should thoroughly understand the history of the matter. I have taken some pains to ascertain these facts. Let us see when martial law was first applied, and in entering upon this investigation, we must carefully eliminate from it all that does not properly belong to it. A rebel in arms stands in the position of a public enemy, therefore you may kill him; standing in the position of a public enemy, you may refuse him quarter; you may, in fact, deal with him in all respects as a public enemy. We must not confound with martial law, as applied to civilians as we are dealing with it to day, that which has been so commonly done in many epochs of our history in the treatment of rebels. We are dealing with martial law proclaimed by executive authority, and exercised for the purpose of suppressing

rebellion. That is a very different thing to dealing with men after the rebellion is suppressed, or upon the field of action. You may find many instances in English history of men put to death who had been taken in rebellious acts. You will find many instances of that sort, but that is not the question we have to deal with. I think the first beginning of what is called by the historians martial law was in the reign of Edward II., when the Earl of Lancaster was taken for rebellion against the King tried before his peers, and sentenced to death. This was called a trial by court-martial by the historians, but it does not appear to have had any reference to martial law. The man was tried by the King, and by his peers, instead of being tried by his peers in Parliament. It was an irregular thing, and I doubt very much whether it was a case of martial law; at all events, the attainder was reversed in a subsequent reign, upon the ground that the whole proceedings had been irregular, the ordinary courts then being opened before which this case ought to have been brought forward. We had no instances of martial law until the insurgents of the reign of Richard II., when Wat Tyler and his followers had been discomforted, and, without the slightest form of trial or any ceremony of that sort at all, were put to death. But it was thought necessary to have an Act of indemnity, even in those days, after the execution had taken place in that irregular manner. In the subsequent reigns of Henry IV. and Henry VI. the practice seems to have sprung up, which was carried to a lamentable excess, of executing those who had taking the field with either of the contending factions during the wars of the houses of York and Lancaster; and as they were captured in the battles they were executed without any form of trial, and the prisoners who fell into the hands of their captors—sometimes men of rank and distinction—were sent from the field to execution, and perhaps only one or two days elapsed but they were always executed without trial. The first instance I can discover in the sense of martial law not of law exercised upon persons taken in arms—was the trials which took place in the reign of Henry VII. after the Battle of Stoke. It appears to have occurred to that subtle monarch, that it might be convenient to have those who had not exactly taken up arms against him, but who had been aiders and abettors in the recent troubles, and therefore he proceeded to try them by some kind of martial law. What was the form of these proceedings, Lord Bacon does not explain; but it seems that the King caused all the persons to whom this law was applied to understand that they were at liberty to compound for their guilt, and the result of that was, that very few were put to death. Respecting these proceedings, no one can entertain the least doubt that they were utterly illegal. If it be true that you can apply martial law for the purpose of suppressing rebellion, it is equally certain you can bring men to trial after the rebellion is suppressed by this martial law; because martial law is founded, according to the authorities, upon the absolute necessities of the case. We have one or two remarkable instances of martial law certainly afterwards. Every instance is not of martial law applied as it is now proposed to apply it—for suppressing rebellion, but for the purpose

of preventing particular things which the subjects happen to dislike. We have two most remarkable ordinances and proclamations of martial law in the time of Queen Elizabeth. There are one or two most remarkable cases in the reign of Edward VII. The proclamation in the time of Edward VI. was on the occasion of a popular insurrection which took place at that time, and you are doubtless aware that this reign was remarkable for the tumultuous state to which the people had gone. It was a time when the whole social fabric seemed to be shaken to its very foundation, and the people were everywhere in a state of insurrection, arising in the main from the circumstances of want and destitution into which they had got, and which different causes helped to bring about. In the first place, the monasteries had been suppressed in the preceeding reign, and they had afforded to the poorer orders of the population employment to a very great degree, and to those who were incapable of employment the means of subsistence. Therefore, whatever faults and vices may be ascribed to monastic institutions, we must do them the justice to say they did their duty towards the poorer classes, and supplied to them that which legislation has since supplied them with, and which otherwise at that time would have been wanting. Those who succeeded to the monasteries did not feel themselves under such obligations, and the result was, that the poor were entirely deprived of those means of subsistence and support which they would otherwise have had. And besides, they were beginning at that period to enclose large portions of common lands, which at that time of day occupied a very considerable portion of the land of this country, and were productive of great advantage to the poorer people, enabling them to keep their animals at but little cost. These commons were enclosed, and the people felt it to be a very great hardship. Also about this time the profit upon the sale and exportation of wool was very great, and the practice came in vogue of making arable land into pasture land, which deprived many people of employment. Then there was the importation of precious metals, and subsequent decrease in the value of money. There were all these sources of agitation, and the result was that in various parts of England a most formidable insurrection was got up. In the West 10,000 men laid siege to the city of Exeter. In that part of the country the people were dissatisfied with the change from the ritual of the Catholic to the more severe and sober forms of the reformed religion, and loudly expressed their dissatisfaction at the change. The priests fomented this, and it led to a combination of social and political discontent mixed up with religious fanaticism; and Exeter had nearly succumbed to the siege when, fortunately, the royal troops appeared. Now, one of the things the inhabitants had been in the habit of doing was to call the people together by the ringing of bells, &c., and a proclamation was then issued by the King, prohibiting all his subjects by any device or token whatever from calling together numbers of people or assembling them for any purpose. That certainly was a very strong proclamation; but it was not a proclamation for the purpose of proclaiming martial law in the way it is understood now. In that



proclamation there are specific acts pointed out, which the King says, 'You shall not do, and if you do these acts you shall be presently executed.' Towards the close of his reign the King issued another proclamation, the reason for it being that the tumultuary insurrection which marked the commencement of his reign was still going on, and in that year (1552) we find him issuing a fresh proclamation. I have searched through the works containing lists of the various acts done by the sovereigns of England, and I have not been able to find out whether that proclamation was acted upon. Let me, however, make this observation, that at various periods of our history it has been the practice of the sovereign to issue proclamations *in terrorem* for the purpose of terrifying the public by those proclamations, though it was pretty well known it was never intended to act upon them, and that they really went beyond the power and prerogative of the Crown. Lord Hale says that too much importance ought not to be attached to proclamations, inasmuch as they are used for the purpose I have mentioned. In the succeeding reigns proclamations were also issued. Queen Elizabeth issued a proclamation regarding martial law, in which she declared that the introduction of heretical works into this country should be punished by that law; and, if I may believe the history of Mr. Hume, she followed in that respect the example of her sister. But I have been unable to discover the source from which Mr. Hume obtained his information; it may probably be true. He cites an authority, but there is nothing in it; and it would be quite beyond the power of the Crown to apply martial law in such a case. But we must not forget the circumstances in which Queen Elizabeth was placed at the time that such proclamation was said to be issued. She had been excommunicated by bulls from Rome, and when the King of Spain thought proper to send his Armada to the shores of this country, a bull was again issued, in which the people of the kingdom were taught to look upon the Queen as an accursed being; and a work by Cardinal Allen had been introduced into the country denouncing the Queen as everything infamous, and urging the people to rise against her. Under these circumstances, one is not surprised at these denunciations from Rome, and the absolution of the people from their allegiance, should have induced her to act in the manner in which she did, and that she thundered on her side against those who were introducing these dangerous instruments and writings into this country. But we cannot doubt that she was going altogether beyond the powers which the constitution entrusted her with. There is another proclamation of martial law. The same cause which had excited the lower orders into a state of insurrection in the reign of Edward VI. still continued. No provision was made for the poor, and great tumults had taken place in various parts of the country, arising from the destitution of the lower orders. There were riots engendered by hunger and destitution. The rioters approached the metropolis, and it happened about that time that the apprentices of London, being for some reason or other dissatisfied and turbulent, joined themselves to these insurrectionary bands. A great deal of disorder took place, and the city

authorities applied to the Government, and requested that martial law should be put in force against these persons. The result was, that the Queen issued a proclamation authorising martial law to be put in force. It certainly was a very strong proceeding on the part of her Majesty. Martial law was ordered to be executed upon any riotous persons, and then it proceeded to that most extraordinary exercise of assumed power—that of declaring that persons who were vagrants should be immediately hung upon the nearest hedge. No one can doubt that that was altogether an unconstitutional proceeding, and beyond any lawful power; but I am happy to say that no one was put to death under that proclamation. A certain number of rioters were taken up; but they were not put to death under martial law. They were brought before the ordinary tribunals of the country and dealt with by them. The next instance is in the reign of Charles I. That King at the commencement of his reign was desirous of embarking in Continental war. His Parliament were not so ardent in that respect as the King, and they desired to obtain a redress of their grievances first, and the result was that they were very sparing their votes. Having tried more than one Parliament, the King at in last had recourse to that illegal mode of obtaining supplies known under the name of benevolences, for the purpose of extorting, if possible, from the subject, allowances where there was no parliamentary power; and in the interval between his third and fourth Parliament, the king had recourse to the practice of quartering soldiers upon such persons as refused to pay those benevolencies. The soldiers who were quartered in this way, knowing that they were quartered upon persons who were obnoxious to the Crown, committed excesses, and the result was that the King finding it necessary to deal with the soldiers by some military process, commissions were issued to try these soldiers who were guilty of military offences by martial law. It was suspected and has been asserted, I do not know whether upon any satisfactory authority, that those commissions for the enforcement of martial law were used for the purpose of trying persons who were obnoxious to the person of the sovereign on account of their having refused to comply with those exactions. But be that as it may, it was at all events though that those commissions might be used for that purpose, and when the King summoned another Parliament, the first thing that Parliament did was to vindicate the rights and liberties of the people of England from those unlawful assumption of prerogative. The celebrated Petition of Right was founded, in which those commissions were declared to be unlawful, and it was solemnly asserted that an English subject was not to be subjected to martial law. The King did his utmost to avoid giving his assent in any way which could bind him to that, but he was compelled at last to give his sanction to it in the usual form, and that Petition of Right, the supplementary charter of English liberties, remains the unquestioned and unquestionable law of the land. We shall have to look presently whether there can be such a thing as martial law. Certain it is, that from that hour martial law has not been attempted to be exercised in England. We

have had rebellions since. There was the case of the duke of Monmouth, in the time of James II., when martial law would have been an extremely useful thing to suppress that rebellion, but it was not put into operation. It is true that Lord Faversham put a number to death, and Kirke committed every species of barbarity. But there was no martial law. All this was done without the form of trial, and what took place was in obedience to Jeffreys; but there was no martial law. Again, we had the rebellions of 1715 and 1745, but on neither of those occasions was martial law proclaimed. It is true that at the battle of Culloden odious barbarities were committed, but there was no martial law. The wounded were put to death; and I rejoice to think that in respect to atrocities which can never be forgotten whilst English history lasts, there is not even a pretence for saying that they were committed even under the name of law, much less under that of martial law. I believe I have mentioned every instance in which martial law has ever been proclaimed or exercised. I can find no such thing as martial law in use in this country for the putting down of rebellion; and I am utterly astonished when I find persons in authority and out of it talking and writing about martial law in the easy familiar way in which they do, as a thing perfectly understood and perfectly settled in this country, whereas, in truth, it has never been resorted to or exercised. True it is that it has been resorted to in a neighbouring country. We all have read of what took place in Ireland at the close of the last century, and it may not be unimportant to turn to that page of history to see what took place. From the year 1790, and thereabouts, Ireland was in a very agitated state. In 1795, insurrections were growing in various parts of the country. It would seem that the magistrates took upon themselves to act under the auspices of martial law without any authority whatever. However, they were the dominant party, and they had a large majority in the Parliament of Ireland, and especially it was thought necessary, in order to prevent open rebellion and all the serious circumstances which it entails, that they should have recourse to means beyond the ordinary law. It was equally thought necessary to have an indemnity passed afterwards for those excesses of the law committed in 1795, and that Act was passed in 1796. It shows that these proceedings were proceedings beyond the law, or else they would not have required the Acts of Indemnity to be afterwards passed. Such an Act was periodically passed every six months by the Irish Legislature until we arrive at 1798, and then things had assumed so serious an aspect that the Lord-Lieutenant thought it right to issue a proclamation declaring martial law in Ireland. That proclamation was put in force. Martial law was carried into effect, and many a person executed by virtue of it. Among the most conspicuous of the promoters of the rebellion was a man of the name of Wolfe Tone. He had been to France and obtained the assistance of the French Government of the day for an invasion of Ireland. They sent a force of ships of war; but those ships of war were intercepted by the English, and the invasion was frustrated. One of the ships was

taken, and Wolfe Tone was found on board of it and arrested. There was no doubt of the active part he had taken in the attempted invasion, and he was brought before a court-martial. He did not at all deny his share in the rebellion, and he was sentenced to death. He was sentenced to be hanged; but he prayed that, as a gentleman and a soldier, having occupied a position of military rank, the form of death should be changed, and that he should die the death of a soldier—namely, by being shot. That prayer, however, was refused, and he was to be hanged. An application was then made to the Court of King's Bench in Ireland on his behalf, for a writ of *habeas corpus*, on the ground that he had been sentenced to death by a court-martial, and that the court-martial was illegal, because the king's courts were sitting at the time, and that the ordinary legal jurisdiction was therefore not superseded. The court at once granted a writ of *habeas corpus*, directing that Mr. Wolfe Tone was to be brought before the court. Upon its being suggested that he had been sentenced to immediate death, and that that sentence would be immediately executed, the Court of King's Bench at once commanded the sheriff to proceed to the place where Wolfe Tone was under military arrest, to take him by force, if necessary, and to bring the military officers to the court, so as to interpose and vindicate the power of the law as against military or martial law. The sheriff proceeded on his mission, but unfortunately found Wolfe Tone dead. Unable to bear the ignominy of an execution at the hands of the hangman, he had cut his throat in prison. I was wrong in saying he was dead; he was dying, and he died a very short time afterwards, and consequently the question was never brought to an issue. It was thought right after that to supersede the proclamation of the Lord-Lieutenant appointing martial law, and to give Parliamentary authority for martial law. Had not Wolfe Tone committed suicide in the way in which he did, we should have had some precedent to guide us in the case now before the court. Nobody doubts for a single moment the authority of Parliament to proclaim martial law, because they can place upon it such conditions, such restrictions, as would enforce the performance of justice, and which would secure it from the irregular, unjust, and oppressive use which otherwise might be made of it. It was thought necessary to get an Act of Indemnity for all that was done under the proclamation of the Lord-Lieutenant, and this Act of Indemnity is to my mind a strong argument against the legality of the exercise of martial law under such conditions; for if the exercise of martial law is sufficient to give authority to the acts done under it, why should it be necessary afterwards to go to Parliament and have an Act of Indemnity passed to shield those persons who acted under martial law when in existence? There was an Indemnity Act passed for the purpose of protecting those who carried this martial law into execution under the Lord-Lieutenant, and when, after the Union, another Act was passed for continuing martial law in Ireland, that Act indemnified all those who should act under it there from criminal or civil process, and prevented their case from being brought within the jurisdiction of the ordinary tribunals at all. Therefore, while there can be no

doubt that Parliament has the power to make such a law a martial law, I cannot but think that, even after what has been done in Ireland, we have no instance in the history of this country in which, by the exercise of the prerogative of the Crown, martial law was carried into operation. Therefore, that is certainly a very strong reason to doubt the assertion so positively made by some people, who tell us that martial law can be resorted to without the consent of Parliament. I have now said what I intended to say on this part of the subject, and I come to the question—if martial law can be proclaimed on the authority of the Crown, and therefore of the representative of the Crown, what then is martial law? Here I must trace the history of martial law. Of course, everybody feels that when you bring large numbers of men together under arms for the purposes of war, or for any other purposes for which military forces are collected, you must have a special law to deal with them, as their efficiency entirely depends on the state of discipline in which they are kept. Of course, when you bring together a body of men in the prime of life, men probably of high and turbulent spirit, it is necessary to have a strict law to keep these persons in proper subjection. Such laws existed from the earliest times, and except during the short period of the civil war in the time of Charles I., it was always held that the military force was under the absolute power of the sovereign. Accordingly, from very early period we find, on the occasion of armies being collected, sovereigns of this colony make laws for the government of their soldiers. Lord Hale, in his history of the common law of England, states that always preparatory to actual war, the king composed a book of rules and orders for the due discipline of officers and soldiers, and this was called martial law; and we have this statement not only from Lord Hale, but I find a succession of these statutes and ordinances of the government of the army. Lord Hale refers to the statutes of Richard II., but there are earlier cases than this; they go as far back as King John. On the occasion of the departure of that monarch by sea for the Holy Land, a statute and ordinance was issued, which was very short and remarkable for the extraordinary severity with which the offences were to be visited. If a man commits murder by sea, he is to be tied to the body of the dead man and thrown into the sea; and if he commits murder on land, he is also to be tied to the dead body and buried alive. If he steals from a comrade, boiling pitch is to be poured upon him. Richard II., in his minute, enters into details which follow the soldier into every department of military life and service. He points out his duty towards the service, his duty to his comrades, and his duty with regard to an armed population with which he may be brought into contact; and he then goes on to state what will follow the infraction of those duties, mentioning the specific penalties. It is not necessary for me further to enter into these matters. I have entered into them sufficiently to show generally the characteristics of these ordinances. We find Henry V. issued several of these ordinances. They have come down to us, and are to be found in the College of Arms, or some other repository. Then we have the ordinances of Henry VII.,

when he mustered his army to go against the rebel forces in the North, which ended in the battle of Stoke ; and, lastly, we have a series of statutes and ordinances published by Henry VIII., when he meditated a French invasion. These point out the duties of the soldier and the penalties to which he will be subjected if he commits any of the offences named. From that time we have no further statutes and ordinances. I suppose it was thought that a succession of them had been thoroughly fixed, and had acquired the importance which the force of custom invariably gives them. In the civil wars we find these ordinances coming up again. When the Scotch army invaded England, the generals published ordinances and rules for the guidance of the soldier, which were very much of the same description to those I have already named. The Earl of Northumberland, who commanded the King's forces, issued an ordinance of a similar character, and when the civil war broke out, the Earl of Essex, compiled an elaborate 'Guide for the Forces.' King James II. did the same thing in the form and name of 'Articles of War,' and substantially these are the 'Articles of War' of the present time. Then again there were the Mutiny Acts which are periodically issued by the sovereign for the regulation of the forces of the realm. Any person who has taken the trouble to look at the Articles of War must do those who framed them the justice to say that they are most elaborate and precise, and that it is impossible for any one who looks into them with the view of ascertaining what his duty is, to fail in discovering it, or find out what the law is by which he is to be guided. So much, then, for military law. There is nothing arbitrary in it. It is precise, specific, and defined. Now let us look at the mode by which that law is carried into effect. From the earliest periods in our history it was administered by competent tribunals under an ascertained and regulated mode of procedure. As early as the time of William I., when the judicature of the country was less clearly defined than at the present time, a 'martial court' was appointed—a court of the High Constable and of the Earl Marshal—and by these great officers the military law was administered. These officers always attended the King's wars—the High Constable of England being the general who commanded next under the King, the Earl-Marshal being his deputy and next to him in rank. These officers had to look after the army and regulate its internal economy, and they held courts for the trial of military offences. This court had a regulated procedure, and was certainly governed by the law of England in some of its most essential particulars. Its procedure was fixed and settled, and continued so to the present time ; and even to this day the procedure of the military courts is perfectly settled and understood. The courts of the High Constable and the Earl-Marshal continued to administer justice in all military matters down to the time of Henry VIII. That monarch, jealous of authority, was dissatisfied at having so near the throne any officers of such distinction and authority, and when the Duke of Buckingham was executed—he having been the High Constable—the King took occasion of his death to abolish the office. The Earl-Marshal continued, however, to exer-

cise jurisdiction in the court as before, and this continued until the time of James I., when a question was raised as to whether—the office of High Constable having ceased—the Earl-Marshal was competent to exercise jurisdiction in military matters in question of life and death; and the Privy Council of that date held that the Earl-Marshal's jurisdiction was not put an end to by the non-existence of the High Constable. But in a subsequent reign, the question being raised, the judges were of opinion that the Earl-Marshal had no jurisdiction beyond the High Constable, and from that time the jurisdiction in criminal matters under the Earl-Marshal has been discontinued. Thereupon it was necessary that there should be some tribunal to exercise martial law who were judges of military matters, and the course pursued seems to have been that a council of war was appointed when the army was in the field; and the officer called General-Marshal was appointed to determine questions of military delinquencies. That tribunal, however, was soon superseded, and the courts-martial were introduced in the manner in which courts-martial are appointed at the present day: and so the law remains. Now, as I have said, the procedure appears from the earliest times to have been carried on in a court, and when that court was superseded, and we got rid of the High Constable and the Earl-Marshal, it appears that the courts-martial adopted the procedure of the tribunal of High Constable and Earl-Marshal, because it is to this day a mixed procedure, a procedure in which the technicalities of our law are dispensed with and a different mode of procedure adopted, but in which those principles and rules with regard to the admissibility of evidence are acted upon in the case of a party accused, as they appear to have been from the earliest period. Now, it cannot be doubted that the procedure of courts-martial is capable of considerable amendment. No one can doubt that the substance of justice is attended to; there is nothing arbitrary or capricious in them; the charge must be distinct; the evidence must be such as an ordinary court of justice would receive; the person who is accused has the fullest opportunity of defence; the witnesses must be confronted with him, and he has an opportunity of cross-examination, but the procedure is certainly somewhat impaired by the mode in which it is carried on. Still, however, he has an opportunity of asking such questions as he may think desirable. He has also the fullest opportunity of being heard. He has the right to call such witnesses as he may think proper; and if such is the law which is applied to the soldier, why should it not be applied to the civilian? Why are we to be told that when you come to deal with a civilian under martial law it is to be something different to the law administered to the soldier under martial law? I confess I am at a loss to conceive any reason for it. At all events, it is very important to see what is the law as applicable to the military portion of the community; and in considering this question we must eliminate from it all that which does not strictly belong to it. I have already adverted to the fact that the execution of persons taken in arms as rebels, or taken in pursuit, is not the question here. There are other things which have been

confounded with martial law which it is essential to separate from it. An eminent authority, dealing with this matter, uses the argument of martial law being founded upon necessity—being a law which was to be expanded to any extent required, commensurate with the necessity of the case. Surely, it is said, you do not mean to say that if a mutiny breaks out on board ship or in an army, you are to have recourse to the ordinary practice of the country? In such a case, certainly not. Where local force and violence are resorted to, you may defend yourself even if it causes the death of your assailant. If a man attacks you with murderous intention, stops you on the highway to rob you, invades the sanctity of your dwelling at night, you are not bound to submit to the injury that may be done, nor are you bound to wait until the wrong has been committed, because you may at once take the law, as it is called, into your own hands, and in self-protection defend yourself. You may quell mutiny by killing a mutineer; and in like manner, if a company in a regiment breaks out in open mutiny you may put it down at once by immediate application to the law; but that is not martial law. This is part and parcel of the law of England. If you can prevent crime by the application of force, you need not wait till crime is perpetrated. You may quell it at once, and prevent it by the application of any force which may be necessary. But that is not what we are now to consider. What we have to consider is, whether in suppressing rebellion by persons not actually engaged in it, you may subject them to a law which in this sense is an anomalous and exceptional law. This is a very important question, and one upon which it is very desirable to see how the authorities stand. (His lordship then proceeded to refer to the opinions of Lord Hale, Lord Coke, and Sir William Blackstone upon the question: quoting the opinion of Lord Hale to the effect that in truth martial law was entirely arbitrary in its character, and was in truth really no law, and was something indulged rather than allowed.) I believe that these passages from Hale and Blackstone have led to a great deal of confusion as regards the use of the term martial law, and that thence sprang up the idea that there was such a thing as martial law as distinguished from military law. These passages have been adopted as showing that martial law is a thing subject to no rule whatever—that whereas in every other system of judicature you ought to have constant and settled rules for the guidance of those who are to administer the law, here you have nothing of the kind. But any one who takes the trouble to look and see what Blackstone and Hale were writing about will see that they were speaking of a law applicable to the soldier, and of military law as one of the powerful and recognised institutions of the country. I think they were both wrong in supposing that martial law, in the sense of military law, was the arbitrary and capricious system which they seem to denounce it as being. I will now call attention to the judgment in the case of Grant. In 1792, a man named Grant, who was a recruiting sergeant—that is to say, who had been led to take the character of sergeant in the army, although he was not actually in the service—was in the pay of the government as a recruiting



sergeant. This man induced two soldiers of the Guards to desert, for the purpose of enlisting in the East India Company's service. He was brought before a court-martial and sentenced to a thousand lashes. An application was made in the Court of Common Pleas to stop the execution of the sentence. The court, adverting to the Mutiny Act, by which it is provided that everybody receiving pay as a soldier shall be amenable to the Mutiny Act and the Articles of War, held that they had no jurisdiction to interfere—Grant's point being that as he was only a nominal sergeant and not actually in the service he could not be tried by court-martial, the Lord Chief Justice of the day makes this observation—that martial law, such as it is described by Hale, does not exist in England at all, and where martial law prevails in any country it is a totally different thing from that which is inaccurately called martial law. According to this distinguished judge, therefore, there is no such thing as martial law in this kingdom. I have seen it lately in print, and, I confess, to my unbounded astonishment, that the Petition of Right has no efficacy beyond the shores of this country, and can have no application in the case of martial law proclaimed by the Governor of Jamaica. The individual who wrote that must have entirely misconceived the character and effect of the statute, which is not an enacting statute, nor one which puts any limit upon the prerogative of the Crown. It is not a statute by which the subject acquires any new rights or immunities as against that prerogative, but it declares what are the rights to which the subject is entitled. And, if the common law of this country is applicable to Jamaica—as I think it is—it therefore follows that the Petition of Right is applicable to that country also. If it is applicable to the law of England, it is clearly applicable to the law of Jamaica. Then there is the Mutiny Act, and there was no great point for which the assertors of popular rights in England so strenuously contended as that the sovereign had no right to maintain a standing army in time of peace. The Mutiny Act contained this recital:—'Whereas the raising of a standing army in time of peace, unless it is with the consent of Parliament, is against the law, and no man can be adjudged of life or limb in time of peace, or punished by martial law except in such a way as he would be by being subject to the established laws of the realm,' &c. Well, I think all this justifies the assertion that martial law cannot be legally applied in an arbitrary and despotic manner. Some persons contend it can, and that it is not a law which has no limit, except as to the particular exigency and convenience of the limit. Now, what authority is there on the other side? In the first place, I find, in a work upon courts-martial, published by a military man, this distinction is certainly taken from a mistaken apprehension of the meaning of Blackstone, whose language is certainly somewhat ambiguous. I find that Mr. Headlam, who was Judge-Advocate, when called upon to give evidence before the Commissioners was of opinion that martial law was arbitrary and uncertain in its nature—that the term law could not be properly applied to it. But I ask for the authority on which he rests that doctrine. I have not been able to find it; and, in a matter of such

importance, gentlemen, before they laid down a positive doctrine like this, ought to be able to show some high authority upon which it rests. Such doctrines as these involve most serious consequences; and while I have great respect for the gentlemen who enunciate them, yet I must confess I should like to know on what authority they ground such views. Sir James Dundas—a man for whom I have great respect, a man of sound judgment and high learning—says: ‘When martial law is proclaimed there is no rule of law by which the officer executing is bound; it is more extensive than ordinary military law; it overrules all other law.’ I should be glad if I could have had the authority for an assertion of this character. I should like the proof for such a statement. With that modesty and fairness which characterises the gentlemen to whom I refer, he certainly says it is not a matter coming within his province as a Judge-Advocate-General! and certainly there is nothing in the office of Judge-Advocate-General to bring under special attention a question of this character—a question having reference to martial law as distinct from military law. Therefore, his opinion is worth little more than that of any other person upon the subject. There are certain other extra-judicial statements upon the subject. It was stated in one of the debates of the House of Lords, by Lord Grey, that two learned lords had represented to him very much to the same effect as what is stated in these opinions, but that is merely extra-judicial and conversational. I must say here, again, that I am at a loss to know upon what authority these opinions are founded. But there is something much more to the point in the reservations which are to be found in two statutes. In 1798, the Irish Act of Parliament which gave statutory power to proclaim martial law gave undoubted power; and also the Act of 1832, which was passed when Ireland was in a state of great agitation, for the continuance of martial law in Ireland, it was thought necessary to give power to proceed by court-martial. Both these statutes had a reservation upon the power of the Crown, and that reservation is in strong and emphatic language. It uses the word the ‘acknowledged’ power of the Crown to declare and proclaim and put in force martial law. On the other hand, it must not be forgotten that these are mere reservations, neither enacting nor declaratory statutes. They are merely reservations, though it is equally clear that a reservation of that kind made by Parliamentary authority is of the greatest weight. When an army was in the field there used to be such things as drumhead court-martial, by which a man was hung almost immediately after the committal of the offence, because it was necessary to make an immediate example of him, and the proceedings might be written on the head of the drum, as they were. This was a nearer approach to martial law than anything that takes place in the ordinary courts for dealing with military offences. But that system has been abolished. Besides this there always has been in our armies a provost-marshal, who in the Articles of War exercises with its assistance a kind of police over the army. When on the march and in the field he is perpetually moving about and examining to see that no offences are committed, and he has juris-

diction not only for that, but he has this jurisdiction—if he himself catches a man in the act of committing an offence, he may apply to him that punishment summarily which would be awarded by the court-martial, but his jurisdiction is entirely confined to delinquencies in which he catches the offenders. No doubt the way in which martial law was administered in Ireland has had something to do with the wrong impressions which have got abroad respecting it. Nobody who reads the correspondence of Lord Cornwallis will fail to notice that he as a soldier complained of the excesses which were done in the name of martial law. But does it follow that because things of this sort are done, because Acts of Indemnity are passed afterwards, that this is law? I shall certainly want some better authority than what I have seen to satisfy me that a British subjects can be made amenable to a jurisdiction of this character. I grant, in times of emergency, when the standard of rebellion is raised, when insurrectionary tumults are going on, when order, peace, and authority are shaken to their foundations, you may have recourse to extreme means; but I say, under no circumstances ought men to be subject to trial for their lives where the essentials of justice are not preserved. There are things which are more important than the suppression of a temporary disorder, things which are associated with the name of justice, which cannot be separated from justice, and no man ought to be subjected to any jurisdiction at variance with the essential principles of justice. Speaking of the Demarara case, Lord Brougham said that martial law was the law of the soldier applied to the civilian; but I will not at this moment take it on myself to say that such is the law. I confess that I have very great difficulty in dealing with this question. Here are conflicting opinions, there is no precedent on the subject, no legal decision has been given, and I am at a loss to know, under the present circumstances, if I can place any confidence in my now opinion. The next question is, supposing it established that putting a man to death under such circumstances constitutes the crime of wilful murder. This is a most important point. I should say that where there is jurisdiction, but where the person having the jurisdiction, acting under some misapprehension, exercises it in a case in which it ought not to be exercised, he is not responsible. But where there is no jurisdiction, and where persons who have no judicial power or authority assume to exercise it, and the life of a man is taken, that is murder. Where it has been exercised under a misapprehension, legally it would be murder; but we cannot doubt that the Crown would grant the person, if found guilty, a free pardon. Those who take on themselves to exercise jurisdiction in exceptional cases, under the notion of some authority which forms part or parcel of the ordinary law, must take heed what they do; if under the notion of a separate jurisdiction they take on themselves to sit in judgment on the life of their fellow men, they are responsible for what they do. If you should be of opinion this case is one in which want of jurisdiction is established, then it is for these people to justify what they have done before a jury of their countrymen, and in a court of English law, where the evidence will be carefully sifted, and the

law ascertained in a careful and mature manner. If they have taken on themselves to put a subject to death without lawful authority, they must be prepared to stand by the consequence of what they did, because they have assumed a power the law did not justify them in making use of. I have hitherto dealt with this subject as regards the general prerogative of the Crown. But it is possible that either by imperial or local legislation, some power may have been given to the Governor of Jamaica which would enable him to exercise this jurisdiction quite independently of any power derived from the Crown." His lordship then proceeded to refer to the Jamaica statutes at some length, and said: "The Legislative Act, which was passed in the ninth year of the present Queen, would certainly appear to have been considered in the island as giving the governor full power to declare and exercise martial law. I suppose there is no island or place in the world in which there has been so much insurrection or disorder as in Jamaica, and there is no place in which the curse which attaches to slavery, both as regards master and slave, has been so fully illustrated. Had not the rains of Heaven washed away the blood from the streets of Jamaica, it would have spoken out against the atrocities which have been committed there. Mr. M. Martin, in his history of the colonies as regards Jamaica, tells us that between the settlement of the colony and the year 1832, a period of 154 years, there had been no less than twenty-eight insurrections of negroes, being upon an average one in every five-and-a-half years, and these were put down with a degree of violence and barbarity which makes us shudder. There were two principal cases—one in which 1,000 negroes perished by execution and by slaughter of every sort, and in which martial law was carried to a great excess. If we may believe the historian of the West Indies, speaking upon the authority of an eye-witness, people were not only put to death, but cruelties of every description were practised upon them. They had to endure unheard-of miseries and barbarities. They were burnt alive, which was a very common form of putting an end to their lives. In some cases care was taken that the torture should be prolonged to the last degree. In thirty-one or thirty-two years there was another great rebellion, and a vast number of executions took place. Therefore we must assume that, according to the view of the inhabitants of Jamaica, either from his commission or this enactment, the Governor was entitled and empowered to proclaim martial law. But we ought not to overlook the fact that it was the powerful acting over the weak. Then we come to the 9th Victoria, sec. 45. That deals with martial law in a large sense. This is a restraining statute which takes away the power of proclaiming martial law, except under given conditions, and which compels the Governor to obtain the consent of a council of war before he can proclaim it. But, supposing the Governor has power to declare martial law, it still leaves us to consider the question to which I have already referred—that is, what is martial law, and how far in dealing with it, and exercising jurisdiction under it, you can set at nought all the rules which from the earliest period had been established as the safeguards of persons

charged with offences, so as to prevent innocence being confounded with guilt."

#### LORD COLONSAY AND THE SCOTTISH BAR.

The Lord Justice-General, when about to be called to the Upper House of Parliament as Baron Colonsay of Colonsay and Oronsay, in the County of Argyle, took farewell of the members of the College of Justice, in presence of an overflowing audience, in the court room of the first division. All the judges were present except Lord Deas, who was absent from indisposition.

The Dean of Faculty, in an eloquent address, observed that the occasion marked rather the culmination than the termination of a singularly successful legal career. His Lordship had discharged with distinction the functions of every high office open to the ambition of the legal profession of Scotland. While at the Bar he was chosen as its head by the free votes of his brethren; he had been honoured by the confidence of the Crown as its first law officer in Scotland, and after a Parliamentary career of great distinction, leaving behind it impressed on the statute book its memorial in the shape of wise and enduring legislation, he had been selected nearly fifteen years ago to preside in the Supreme Courts of Scotland. "We have," added Mr. Moncrieff, "heard it is the pleasure of her Majesty to bestow still higher rewards in token of your Lordship's long services. If a peerage were only the reward of services, long, meritoriously and ably discharged, we should think the Bar of Scotland honoured in your lordships person; but as we regard it a recognition of a debt due to Scotland, tardily but well conferred, we cannot but feel assured that if your lordship's career in that more elevated seat be as useful to the public as your presidency in that chair has been, you will confer on the country in which we live, and on a system of jurisprudence of which we are justly proud, fresh and increased obligation."

The Lord Justice-General, addressing the Dean, said:—

"More than fifty years have elapsed since I joined the ranks of the faculty, at a time when some of those great men, whose names we still revere and cherish, were in the zenith of their power and fame. The lapse of half a century has necessarily brought great changes in the ranks of the faculty, but it is most gratifying to receive the assurance that it brought no change in those kindly feelings which, during the whole period of my forensic career, I have experienced from my brethren. You have been kind enough to allude to the circumstance that I have been the recipient of not a few marks of professional and official distinction; but I can truly say that none of them gave me more heartfelt gratification than to be placed by the united voices of my brethren in the chair which you, sir, now so worthily fill. You have been pleased to refer to another circumstance, which, if it be the gracious pleasure of her Majesty to realize, we can only regard as one more of the many proofs which she has been pleased to give of her constant eye on this part of her dominions, and her

disposition to allow the ancient institutions of this part of her kingdom to participate in those honours of which she is the source. If I am placed in a position to discharge duties of the kind such as I have been in use to do, I shall endeavour to the best of my ability to perform that task."

Similar addresses were also presented from the Society of Waiters to the Signet and the Society of Solicitors of the Supreme Court.

#### RETIREMENT OF JUDGE LONGFIELD.

The following address has been presented by a deputation from the Council of the Incorporated Law Society of Ireland to Judge Longfield, upon the occasion of his retirement from the Landed Estates' Court.

"Sir,—On the part of the attorneys and solicitors of Ireland, we desire, on the occasion of your retirement, to express, not only our sentiments of respect for your great ability and learning, but also our appreciation of the manner in which you have filled the high and difficult judicial position which you have just vacated, as well as regret at your retirement.

"We also desire to thank you for the kindness and consideration which we received at your hands during your judicial career, and to bear testimony, as we gladly do, to the fact that, in the discharge of our professional duties in your court, we have ever received a patient hearing, and had a confidence reposed in our good faith which was both flattering and encouraging, and which we believe is calculated to strengthen and elevate the tone of professional honour and rectitude, not only to the benefit of the profession but also of the interests of the suitors of the court.

"We remain, sir, on behalf of the council, your faithful servants,

"RICHARD JOHN THEO. ORPEN, President.

"JOHN H. GODDARD, Secretary.

"Solicitors' Hall, Four Courts, Dublin."

The following is the learned Judge's reply:—

"47, Fitzwilliam Square, 4th March, 1867.

"Gentlemen,—I return you my sincere thanks for the address with which you have honoured me on the occasion of my retirement from the Landed Estates' Court.

"I am perfectly conscious that for several flattering expressions in that address I am indebted solely to your kindness, and it gives me great pleasure to believe that such friendly feelings are entertained towards me by the profession with which my duties in court brought me into constant intercourse.

"I am happy also to have this opportunity of returning thanks for the assistance which you afforded the court in the difficult and important task which it was called upon to perform.

"Some persons affected to think that your profession was more interested in the abuses of the law than in the administration of justice, and they predicted that you would show some hostility to a court which, rejecting ordinary and expensive forms, should endeavour to make the road to justice safe, simple, cheap, and expeditious.

" Their predictions were disappointed. From the commencement we had the advantage of your active co-operation, and I have to acknowledge gratefully that I received from members of your profession some valuable suggestions which have become incorporated in the rules and practice of the court.

" You have alluded to the confidence which I always placed in your good faith.

" I believed that it was expedient to the administration of justice that I should do so, and that you were well deserving to have that confidence reposed in you ; and experience has justified that opinion, for I found no instance in which that confidence was abused.

" I remain, gentlemen, your's very truly,

" MOUNTFORD LONGFIELD."

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## EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Hilary Term, 1867.*

At the Final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—Owen W. Harris, F. Vincent Budge, Alfred G. Renshaw, Hyman Montagu, Henry Hand, Junr., and Isaac Hopper.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books :—

To Mr. Harris the Prize of the Honorable Society of Clifford's Inn. To Mr. Budge, the Prize of the Honourable Society of Clement's Inn. To Mr. Renshaw, Mr. Montagu, Mr. Hand, and Mr. Hopper, each one of the Prizes of the Incorporated Law Society.

The Examiners have also certified that the following Candidates, under the age of 26, passed Examinations which entitle them to commendation :—Harold Brown, H. M. Durnford, J. R. L. Hazledine, A. B. Johnson, R. E. Leman, William Maples, William Morris, Stuart Le Blanc Smith, E. D. Thomas, J. P. Walls, Frederick Wolfe, and Sidney Woolfe. The Council have accordingly awarded them Certificates of Merit.

The Examiners further announced to the following Candidates, that their answers to the questions at the examination were highly satisfactory, and would have entitled them to a certificate of merit, if they had not been above the age of 26 :—W. H. Colebourn, W. J. Jarmain, William Reeve, Edward Smith, H. A. Stephens.

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## APPOINTMENTS.

THE Rt. Hon. Sir Hugh M'Calmont Cairns, Lord Justice of Appeal, has been raised to the peerage by the title of Baron Cairns.

The Queen has been pleased to appoint the Right Hon. Sir William Erle, the Earl of Lichfield; Lord Elcho, the Right Hon. Sir Edmund Walker Head, K.C.B., Sir Daniel Gooch, Herman Merivale, Esq., C.B., James Booth, Esq., C.B., John Arthur Roebuck, Esq., Q.C., M.P., Thomas Hughes, Esq., barrister-at-law, Frederick Harrison, Esq., Barrister-at-law, and William Mathews, Esq., to be Her Majesty's Commissioners to inquire into and report on the organisation and rules of trades' unions and other associations, whether of workmen or employers, and to inquire into and report on the effect produced by such trades' unions and associations on the workmen and employers respectively, and on the relations between workmen and employers, and on the trade and industry of the country, with power to investigate any recent acts of intimidation, outrage, or wrong alleged to have been promoted, encouraged, or connived at by such trades' unions or other associations, and also to suggest any improvements to be made in the law with respect to the matters aforesaid, or with respect to the relations between workmen and their employers for the mutual benefit of both parties.

Mr. James John Lonsdale, Judge of the West Riding of Yorkshire and Lancashire County Court (Circuit No. 11), has been transferred to the West Kent District (Circuit, No. 48), in the room of the late Mr. Espinasse, and Mr. W. T. S. Daniel, Q.C., of the Chancery bar, has been appointed Judge of the County Court Circuit No. 11, *vice* Mr. Lonsdale.

Mr. Francis Barrow, of the Home Circuit, has been appointed Recorder of Rochester, *vice* Mr. Espinasse, deceased.

The Hon. Dudley Francis Fortescue, M.P., has been appointed a Commissioner in Lunacy, in the room of the late Mr. Robert Gordon, Esq.

Mr. Henry Thurston Holland has been appointed legal adviser to the Colonial Office.

Mr. George Sclater Booth, M.P. for North Hants, has been appointed Parliamentary Secretary to the Poor Law Board, rendered vacant by the resignation of Mr. Ralph Erle.

Mr. T. H. Farrer, Assistant Secretary in the Marine Department of the Board of Trade, has been appointed to succeed Sir James Emerson Tennent as permanent Secretary; Mr. Charles Cecil Trevor, Barrister-at-Law, Assistant Secretary for Harbours and Foreshores in connection with the Board of Trade; and Mr. Felix Hargrave Hamel, late Clerk in the Solicitors' Office Customs, Law Clerk in connection with the Harbour Department.

Mr. Edward Bloxam, Solicitor, has been appointed Chief Clerk to Vice-Chancellor Wood, in the place of Mr. Edward Weatherall, deceased.



Mr. William Edwood Shirley, Solicitor, has been appointed Town Clerk of Doncaster, in the place of Mr. T. B. Mason, resigned, and Mr. C. A. Curwood, Deputy Town-Clerk of Liverpool, Town Clerk of Leeds.

SCOTLAND.—The Right Hon. Duncan McNeill, Lord Justice General, has been raised to peerage by the title of Baron Colonsay; and the Rt. Hon. Sir John Inglis, Justice Clerk, has been appointed Lord Justice General.

Mr. George Patton, Lord Advocate, has been appointed Justice Clerk and President of the Second Division; Mr. Edward Streathearn Gordon, Solicitor-General, has been appointed Lord Advocate; and Mr. John Millar, Advocate, has been appointed Solicitor-General.

IRELAND.—The Right Hon. Abraham Brewster, Lord Justice of Appeal, has been appointed Lord Chancellor of Ireland in succession to the Right Hon. Francis Blackburne, resigned; the Hon. Mr. Justice Christian has been appointed Lord Justice of Appeal in the room of Mr. Brewster; the Right Hon. Michael Morris, M.P., Attorney-General, has been appointed a Judge of the Court of Common Pleas in succession to the Hon. Justice Christian; Mr. Hedges Eyre Chatterton, Q.C., Solicitor-General, has been appointed Attorney-General in place of Mr. Morris; and Mr. Robert Richard Warren, Q.C., has been appointed Solicitor-General, succeeding Mr. Chatterton.

The Right Hon. Joseph Napier, formerly Lord Chancellor, has been granted the dignity of a baronet of the United Kingdom.

The following gentlemen have been appointed Queens' Counsel:—Mr. Henry G. Leslie, Mr. James C. Lowry, Mr. Charles H. Todd, Mr. W. Ryan, Mr. Romney Foley, Mr. Finch White, and Mr. Frederick R. Falkner.

Mr. Lucius H. Deering has been appointed one of the Official Assignees of the Court of Bankruptcy, vacant by the resignation of Mr. Murphy. Mr. Hugh Lane, Solicitor, has been appointed Clerk of the Crown for the county of Londonderry, in the place of the late Mr. John Martin. Mr. J. F. Waller, L.L.D., Barrister at Law, has been appointed to the office of Reader and Clerk of the Rolls Court; and Mr. Robert O'Hara has been appointed Parliamentary Draughtsman to the Irish office in London, and the chief secretary's office in London. Mr. Henry O. Baker has been appointed Assistant-Registrar of Deeds in Ireland, vacant by the resignation of Mr. J. E. Chapman; and Mr. William Lawder, Solicitor, has been appointed Clerk of the Crown for the county of Roscommon, in the place of Mr. William Young, resigned.

AFRICA.—Mr. David Peter Chalmers has been appointed Magistrate for Her Majesty's settlements on the River Gambia, on the Western Coast of Africa.

CHINA.—Mr. Edward Wallace Goodlake has been appointed a Police Magistrate for the Colony of Hongkong.

INDIA.—Mr. Charles Henry Stewart, Deputy Advocate for the Island of Ceylon, has been appointed to act as Puisne Judge of the Supreme Court of Ceylon, in the room of the Hon. H. Byerley

Thompson, deceased, and Mr. F. A. B. Glover of the Bengal Civil Service, to officiate as Judge of the High Court of Judicature at Calcutta; Mr. John Philip Green, Barrister-at-Law, has been appointed to act as Remembrancer of Legal Affairs at Bombay, until the return of Mr. J. S. White; and Mr. R. B. Swinton, of the Madras Civil Service, and a Barrister-at-Law, to act as Registrar of the High Court of Madras, in its appellate jurisdiction, during the absence of Mr. P. P. Hutchins; Mr. Loftus Richard Tottenham, of the Bengal Civil Service, has been appointed Registrar of the High Court at Calcutta; Mr. Henry Stewart Cunningham, M.A., Barrister-at-Law, Advocate and Legal Adviser to the Government of the Punjab; and Mr. W. Jardine, officiating Principal of the Lahore College, to the Law Professorship of the Government College in the North-Western Provinces of India.

**JAMAICA.**—Mr. Thomas Kennedy Lowry, Q.C., of the Irish Bar, is one of the new Colonial Judges recently appointed in Jamaica.

**MALTA.**—Mr. Lorenzo Xuereb, LL.D., has been appointed one of Her Majesty's Judges for the Island of Malta..

## Necrology.

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### *December.*

- 15th. PARROTT, JASPER, Esq., Solicitor, aged 86.  
 31st. SWANN, CHRISTOPHER, Esq., Solicitor, aged 73.

### *January.*

- 5th. THOMSON, Hon. H. BYERLEY, a Judge of the Supreme  
 Court of Ceylon, aged 44.  
 29th. PRALL, RICHARD, Esq., Solicitor, aged 64.  
 29th. GREENE, JOHN, Esq., Solicitor, aged 56.

### *February.*

- 3rd. BARTON, EDWARD, G., Esq., Barrister-at-Law.  
 4th. COLE, ROBERT, Esq., F.S.A., Solicitor, aged 77.  
 5th. WINSER, CHARLES, Esq., Barrister-at-Law, aged 58.  
 6th. PHILLIPS, JAMES, Esq., Solicitor, aged 77.  
 6th. DIXON, WILLIAM, Esq., Solicitor, aged 44.  
 8th. ROBINSON, H. CRABBE, Esq., Barrister-at-Law, aged 91.  
 11th. STEVENS, HENRY, Esq., Barrister-at-Law, aged 53.  
 12th. KNOWLES, CHARLES JAMES, Esq., Q.C., aged 68.  
 14th. MACKRELL, W. T., Esq., Solicitor, aged 55.  
 15th. KING, J. T., Esq., Solicitor, aged 68.  
 15th. HAYNES, J. B., Esq., Barrister-at-Law, aged 72.  
 16th. NORTHCOTE, HENRY, Esq., Barrister-at-Law, aged 55.  
 16th. TOWER, CHRISTOPHER T., Esq., Barrister-at-Law, aged 91.  
 17th. HELPS, RICHARD, Esq., Solicitor, aged 56.  
 18th. COOKE, FREDERIC, Esq., Solicitor, aged 70.  
 22nd. BOSWORTH, F. W., Esq., Barrister-at-Law, aged 41.  
 25th. PATERSON, GEORGE, Esq., Barrister-at-Law, aged 28.  
 27th. COOPER, WILLIAM H., Esq., Solicitor, aged 54.  
 28th. FLETCHER, JOHN, Esq., Solicitor.

*March.*

- 1st. FAITHFULL, E. CHAMBERLAIN, Esq., Solicitor, aged 79.
- 2nd. MARSH, W. COXHEAD, Esq., Barrister-at-Law, aged 87.
- 3rd. BOWKER, WILLIAM, Esq., Solicitor, aged 78.
- 7th. MARTIN, JOSEPH, Esq., Barrister-at-Law, aged 91.
- 13th. KEENLYSIDE, T. W., Esq., Solicitor, aged 68.
- 14th. CLAPHAM, SAMUEL, Esq., Solicitor, aged 67.
- 16th. GROWSE, ROBERT, Esq., Town Clerk and Coroner for Hastings, aged 39.
- 16th. ESPINASSE, JAMES, Esq., Recorder of Rochester, and County-Court Judge, aged 68.
- 18th. HEMPSON, GEORGE, Esq., Solicitor, aged 30.
- 18th. ALLISON, W. GRANT, Esq., Solicitor, aged 69.
- 28th. PRATT, WILLIAM TIDD, Esq., Barrister-at-Law, aged 44.
- 28th. FORTESCUE-BRICKDALE, J. F., Esq., Barrister-at-Law, aged 79.

*April.*

- 2nd. PORTINGTON, ANTHONY, Esq., Solicitor, aged 63.
- 9th. BURGON, W., Esq., Solicitor, aged 43.
- 9th. HAWLEY, JOHN, Esq., Solicitor, aged 59.
- 11th. TATTERSALL, JOHN, Esq., Solicitor, aged 62.
- 12th. HEANE, HENRY, Esq., Solicitor, aged 57.
- 14th. CHURCH, J. WILLIAM, Esq., Barrister-at-Law, aged 37.
- 15th. TAPPING, WILIAM, Esq., Barrister-at-Law, aged 45.
- 19th. SURTEES, SIR S. VILLIERS, D.C.L., late Chief Justice of the Mauritius.
- 19th. WEATHERALL, EDWARD, Esq., Solicitor, aged 69.
- 21st. HAWKE, JOHN, Esq., Solicitor, aged 46.
- 24th. SWARBRECK, THOMAS, Esq., Solicitor, aged 70.

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THE  
Law Magazine and Law Review:  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

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No. XLVI.

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ART. I.—THE PRESERVATION AND AMENDMENT  
OF TRIAL BY JURY.\*

BY GEORGE OVEREND.

THE institution of trial by jury has been ascribed by different authors to various persons and nations. Sir William Blackstone is of opinion that it originated with the Saxon and other northern nations.

“Some authors,” writes Sir William, “have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon Colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, *boni homines*, usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord’s vassals judged each other in the lord’s courts, so the king’s vassals, or the lords themselves, judged each other in the king’s court. In England we find actual mention

\* Essay, to which the first prize was awarded, offered by the Special Committee of the Law Amendment Society on Jury Trial.

of them so early as the laws of King Ethelred, and that not as a new invention. Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was contemporary with our King Egbert. Just as we are apt to impute the invention of this and some other pieces of juridical polity to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything: and as the tradition of ancient Greece placed to the account of their own Hercules, whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other."

This opinion has been controverted with much learning and ingenuity by Dr. Pettingal in his inquiry into the "Use and Practice of Juries among the Greeks and Romans." Dr. Pettingal deduces the origin of juries from these ancient nations.

"He begins with determining the meaning of the word *δικασαι* in the Greek, and *judices* in the Roman writers. "The common acceptation of these words (says he), and the idea generally annexed to them, is that of *presidents of courts*, or, as we call them, *judges*; as such they are understood by commentators, and rendered by critics. Dr. Middleton, in his life of Cicero, expressly calls the *judices*, *judges of the bench*; and Archbishop Potter, and in short all modern writers upon the Greek or Roman orators, or authors in general, express *δικασαι* and *judices* by such terms as convey the idea of *presidents in courts of justice*. The propriety of this is doubted of, and has given occasion for this inquiry; in which is shown, from the best Greek and Roman authorities, that neither the *δικασαι* of the Greeks, nor the *judices* of the Romans, ever signified *presidents in courts of judicature*, or judges of the bench; but, on the contrary, they were distinguished from

each other, and the difference of their duty and function was carefully and clearly pointed out by the orators in their pleadings, who were the best authorities in those cases in which the question related to forms of law and methods of proceeding in judicial affairs and criminal process.

“ The presidents of the courts in criminal trials at Athens were the nine archons, or chief magistrates, of which whoever presided was called *ηγεμων δικαστηρις* president of the court. These nine presided in different causes peculiar to each jurisdiction. The archon, properly so called, had belonging to his department all pupillary and heritable cases; the *βασιλεύς* had charge of the public worship, and the conduct of criminal processes; the *polemarchus* exercised authority over strangers and sojourners, and attended to various other matters; and the *thesmothetai*, the six junior archons, judged causes assigned to no special court, &c. (See *Liddell & Scott.*)

“ Wherever then the *ανδρες δικασαι*, or judicial men, are addressed by the Greek orators in their speeches, they are not to be understood to be the presiding magistrates, but another class of men, who were to inquire into the state of the cause before them, by witnesses and other methods of coming at truth; and, after inquiry made and witnesses heard, to report their opinion and verdict to the president, who was to declare it.

“ The several steps and circumstances attending this judicial proceeding are so similar to the forms observed by our jury, that the reader cannot doubt but that the nature, intent, and proceedings of the *δικαστηριον* among the Greeks were the same with the English jury; namely, for the protection of the lower people from the power and oppression of the great, by administering equal law and justice to all ranks; and therefore when the Greek orators directed their speeches to the *ανδρες δικασαι*, as we see in Demosthenes, Æschines, and Lysias, we are to understand it in the same sense as when our lawyers at the Bar say, *Gentlemen of the Jury.*

“ So likewise among the Romans, the *judices* in their pl



at the Bar, never signified judges of the bench, or presidents of the court, but a body or order of men, whose office in the courts of judicature was distinct from that of the prætor or *judex questionis*, which answered to our judge of the bench, and was the same with the archon, or *ἡγεμῶν δικάστηρις* of the Greeks: whereas the duty of the *judices* consisted in being empannelled, as we call it, challenged, and sworn to try uprightly the case before them; and when they had agreed upon their opinion or verdict, to deliver it to the president who was to pronounce it. This kind of judicial process was first introduced into the Athenian polity by Solon, and thence copied into the Roman republic, as probable means of procuring just judgment, and protecting the lower people from the oppression or arbitrary decisions of their superiors.

“ When the Romans were settled in Britain as a province, they carried with them their *jura* and *instituta*, their laws and customs, which was a practice essential to all colonies; hence the Britons, and other countries of Germany and Gaul, learned from them the Roman laws and customs; and upon the irruption of the northern nations into the southern kingdoms of Europe, the laws and institutions of the Romans remained, when the power that introduced them was withdrawn: and Montesquieu tells us, that under the first race of kings in France, about the fifth century, the Romans that remained, and the Burgundians their new masters, lived together under the same Roman laws and police, and particularly the same forms of judicature. How reasonable then is it to conclude, that in the Roman courts of judicature continued among the Burgundians, the form of a jury remained in the same state as it was used at Rome. It is certain, Montesquieu, speaking of those times, mentions the *pairès*, or *hommes de fief*, homagers or peers, which in the same chapter he calls *juges*, *judges*, or jurymen: so that we hence see how at that time the *hommes de fief*, or ‘men of the fief,’ were called *peers*, and those peers were *juges* or jurymen. These were the same as are called in the laws of the Confessor, *pers de la tenure*,

the 'peers of the tenure, or homagers,' out of whom the jury of peers were chosen, to try a matter in dispute between the lord and his tenant, or any other point of controversy in the manor. So, likewise, in all other parts of Europe, where the Roman colonies had been, the Goths succeeding them, continued to make use of the same laws and institutions, which they found to be established there by the first conquerors. This is a much more natural way of accounting for the origin of a jury in Europe, than having recourse to the fabulous story of Woden and his savage Scythian companions, as the first introducers of so humane and beneficent an institution."

Such are the opinions of eminent writers, but, as will be seen, we do not entirely agree with them.

Without pretending to decide this question, which has been keenly debated by various authors, we shall merely observe that in our opinion, no particular nation, people, or individual can exclusively claim the merit of having originated the general principle of "trial by jury." We suspect that no one would go the length of affirming that the system of mere trial itself, (setting aside the consideration of the particular form of trial by jury) was invented by a certain nation or person. Who originated trials, according to law or to some custom? It is evident that the idea of deciding certain questions affecting life or death, and to some extent other matters, occurred to various peoples that had little or no communication with each other. There is no proof that they borrowed the idea of settling any disputed question by trial, any more than there is a proof that they borrowed the idea of settling their quarrels by fighting. It is reasonable to suppose that certain ideas are common property among mankind, and are derived from our common ancestors, the patriarchs. In proof of our assertion we need only mention the custom of some, if not of all the tribes of the North American Indians to try certain questions of life and death, as well as some other matters, by a tribe in council, in reality, we may say, by a jury.

Describing the trial of a young American Indian warrior by

his tribe for the crime of cowardice, an American author writes :—" The more aged chiefs in the centre communed with each other in short and broken sentences. Not a word was uttered that did not convey the meaning of the speaker in the simplest and most energetic form. Again, a long and deeply solemn pause took place. It was known by all present to be the grave precursor of a weighty and important judgment."

It is true that this is but a rude and imperfect form of trial by jury, since the accused does not seem to be allowed to speak for himself, and the witnesses are not subjected to regular cross-examination, but still the fate of the prisoner is decided by a jury of his own tribe ; in a word, by his peers, and not by any single chief who acts as a judge. How, then, can it be alleged that Woden, the Saxons, the Scandinavians, the Greeks, the Romans, or any other particular people or tribe originated the system of trial by jury, since traces of the custom are to be found among savages in North America? They had not borrowed the form of trial by jury from Europe. We suspect that the germ of the system existed, during the early ages, among many races of mankind, and that it grew into a better regulated and more systematic law among those that made in times past advances in Christianity and its accompanying enlightenment.

Of the judicatures for hearing civil causes among the Athenians, the court called *Heliaea* was the greatest. All the Athenians who were free citizens were allowed by law to sit in this court ; but before they took their seats, were sworn by *Apollo Patris*, *Ceres*, and *Jupiter*, the king, that they would decide all things righteously and according to law, where there was any law to guide them, and by the rules of natural equity, where there was none. This court consisted at least of fifty, but its usual number was five hundred judges. When causes of very great consequence were to be tried, one thousand sat therein ; and now and then the judges were increased to fifteen hundred, and even to two thousand. It will be perceived that

these courts were in reality composed of jurymen, every free citizen being allowed to sit in them.

A popular form of trial was not unknown among the Jews. Moses set up two courts in all the cities; one consisting of priests and Levites to determine points concerning the law and religion, the other consisting of *heads* of families to decide civil matters.

After having thus alluded to the probable origin of trial by jury, we must now briefly state what a jury is.

A jury consists of a certain number of men sworn to inquire into and try a matter of fact, and to declare the truth upon such evidence as shall appear before them. Juries are in Great Britain, &c., (Scotland, in some degree, excepted) the supreme judges in all courts, and in all causes in which the life and, in some cases, in which the property or the reputation of any man is concerned.\* This is the distinguishing privilege of every Briton, and one of the most glorious advantages of our constitution; for, as every one is tried by his peers (or equals), the meanest subject is as safe and as free as the greatest.

A juror or jurymen, in a legal sense, is one of those twenty-four or twelve men who are sworn to deliver truth upon such evidence as shall be given them touching any matter in question.

The punishment for perjury or fraud committed by a jury used to be very severe. The process commenced against a jury for bringing a false verdict was called an "attaint,"—a writ that lay after judgment against a jury of twelve men that had given a false verdict in any court of record, in an action real or personal in which the debt or damages amounted to above forty shillings. The jury that had to try this false verdict consisted of twenty-four, and was called the grand jury. The practice of setting aside verdicts upon motion and of granting new trials, has so superseded the use of "attaints" that there is scarcely an instance of an attaint later than the sixteenth century.

\* County and other courts now limit the extent of the remarks made on this subject by various writers.

The duty of a jury is to decide the facts of a cause tried by them. The duty of a judge is to decide what is the law respecting these facts. It has been truly said: "If it be demanded, what is the fact? the judge cannot answer it; if it be asked what is law? the jury cannot answer it. . . . The fact is to be tried, that is, as it is intended, by the verdict of twelve men. That is called in law a *trial*."

"The principle of trial by jury is," says a learned and eloquent writer on "Trial by Jury," "that questions of fact, involving the rights of the people, shall be determined by the people themselves, in contradistinction to the decision of those facts by fixed and salaried judges, appointed by and dependent upon the sovereign power in the state."\*

The assembling of a jury to try a cause is so managed that protection is afforded to both sides in an action, in order that fair play shall be observed. When a jury is demanded to try a cause, it is asked, "And this the said A. prays may be enquired of by the country;" or, "And of this he puts himself upon the country, and the said B. does the like." The court then commands the sheriff, "that he cause to come here, on such a day, twelve free and lawful men, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." The sheriff returns the names of the jurors in a panel (a little pane or oblong piece of parchment) annexed to the writ. After a certain delay and some forms have been gone through, the jury is assembled to hear the cause.

"Let us observe (with Sir Matthew Hale) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth beyond any other method of trial in the world. For, first, the person returning the jurors is a man of some fortune and consequence; so that he may be not only the less tempted to commit wilful

\* Trial by Jury, the Birthright of the People of England. p. 14. London: Hardwicke, 192, Piccadilly. One Shilling.

errors, but likewise be responsible for the faults either of himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next as to the time of their return; the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, so that they may be challenged upon just cause; while, at the same time, by means of the compulsory process (of *distringas*, or *habeas corpora*) the cause is not likely to be retarded through defect of jurors. Thirdly, as to the place of their appearance there is a provision most excellently calculated for the saving of expense to the parties. The troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the county where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges, persons whose learning and dignity secure their jurisdiction from contempt. The very point of their being strangers in the county is of infinite service in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like.

“The jurors contained in the panel alluded to before, are either special or common jurors. Special juries were originally introduced in trials at Bar, when the causes were of too great a nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.”—*Blackstone*.

In the present day, juries in civil causes procure refreshments when the judge takes his, but the custom of the jury being kept without meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed, is a method of accelerating unanimity which was not unknown in

other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire, if, after the congress was opened, the electors delayed the election of a king of the Romans for thirty days, they were fed only with bread and water till the same was accomplished. In England, it has been said, that if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. The modern custom seems to be for the judge to discharge the jury; and a recent case, (that of a woman who was tried for murder, and who, after the jury had been discharged by the judge because they could not agree in their verdict, contended that the judge had acted illegally,) appears to have determined the question that a judge has the power.

The necessity for unanimity in the verdict of a jury, seems to be almost peculiar to the English constitution; at least, in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part, and in case of equality, the defendant was held to be acquitted.

In Scotland, the ordinary jury, consisting of fifteen, give their verdict by a majority. Trial by jury, in civil causes, is only partially adopted. It was not, until lately, added to the jurisdiction of the supreme civil tribunal, denominated the Court of Session. Trial by jury in Scotland is limited to certain descriptions of cases, and is not popular; in this respect there is a great difference between English and Scotch law.

In England and Ireland, where the principle of the criminal law requires the injured party or his representative to prosecute, he can only do so by permission of a jury of accusation, called the grand jury, which consists, ordinarily, of twenty-four men. To find a bill, there must, at least, twelve of the jury agree. Another jury, which consists in England and Ireland of twelve men (the petty jury), sits for the purpose of deciding if the

evidence against the accused (if he plead not guilty) has established his guilt.

A coroner's jury inquires into the facts of a case, when any person is slain, or dies suddenly, or in prison, or under suspicious circumstances. In Scotland there is no coroner's jury or inquest. The state of the Scotch law in this respect seems to be very unsatisfactory.

The limits of this essay do not permit us to mention other descriptions of juries, but they are all founded upon the grand principle of the trial of facts by the country, or in other words, by the people themselves.

As we have stated, the origin of the common law of England is involved in deep obscurity. The reader must understand that the reason why so much value is attached to the common law is, because trial by jury is one of its principles. In the time of Alfred the Great, the local customs of the several provinces of the kingdom had grown so various, that he found it expedient to compile his dome-book, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of Edward IV., but is now unfortunately lost.

The irruption and establishment of the Danes in England, introduced new customs. The code of Alfred the Great fell into disuse or was mixed with other laws in many provinces, so that about the beginning of the 11th century there were three principal systems of laws prevailing in different districts. Out of these three laws, King Edward the Confessor, it is said, extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom, and it seems to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such editions and improvements as the experience of a century and a half had suggested. It is recorded in history that Edward framed equitable laws; for we find that when the people complained of the oppression of the Norman kings, they demanded "the good old laws of Edward the Confessor."



It would be difficult to determine even from these codes of the laws of the Anglo-Saxons, whether trial by jury entirely originated in England from these laws. "It is a point of curious inquiry, not yet, so far as we know, fully discussed," observes a writer, "to ascertain how far the Saxons, on their invasion of the island, moulded, or adapted their political institutions to those which they found existing in Roman-Britain. The Saxons, we know, ultimately possessed themselves of all the Roman walled cities, of which they formed their boroughs; and it is hardly conceivable that a comparatively small body of invaders would completely overturn all those municipal institutions, which, though less free than their own, would present them, so far as administration was concerned, with useful means for securing and consolidating their acquisitions. The principal Saxon boroughs existing at the period of the Norman conquest, were the towns still girt by the walls and towers erected under the Roman regime."

The laws of Edward the Confessor were those which our ancestors struggled so hardly to maintain under the first princes of the Norman line, and which princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by emergencies or domestic discontents. In England, the progress of liberty has been in a great measure attributed to the division of interests in the country. The great nobility had an interest in checking the power of the Crown, and the Crown had an interest in checking the power of the nobles. Each party in turn courted the aid, both personal and pecuniary, of the commons. Hence the active part which the people, especially of London and of the large towns, took with the barons in enforcing the solemn settlement of the limits of the royal prerogative, which was embodied in "the Great Charter, or Magna Charta" conceded by King John on the 15th June, 1215, wherein it is distinctly expressed that all cities, boroughs, and ports shall have "their liberties and free customs." The famous clause which has attracted chief interest, is that which enacts that no freeman shall be

affected in his person or property, save by the legal judgment of his peers, or by the law of the land. The judgment by peers is held to refer to trial by jury. Legal writers have found a stately tree of liberty growing out of the seed planted by this simple sentence. They see in it the origin of the judicial strictness, which has kept the English judges so closely to the rules laid down for them in the books and decisions of their predecessors. There was a further leaning on the part of the barons to the popular system of the common law, from the circumstance that attempts were made to introduce the doctrines of the civil (Roman) and canon laws, which are inimical to trial by jury. The Great Charter has always been a great object of veneration with the English nation, and Sir Edward Coke reckons thirty different occasions on which it was ratified.

On the other hand, the kings of England frequently sought to obtain the co-operation of the people to limit the power of the nobles. The Crusades were the means of promoting the establishment of the common law, and consequently of trial by jury, upon a firmer basis. The absence of so many great barons, during the time of the Crusades, was a means of enabling the common people, that had hitherto lived in feudal subjection to the nobility, to raise themselves in public standing and estimation; while the possessions of many of these barons, by sales, or the deaths of their owners, without heirs, reverted to the sovereigns. In this way the power of the people and of the Crown advanced together, and both at the expense of the class of nobility. The people were not unwilling to exchange the mastery of the barons, for that of the monarch, and the kings on their part looked on this rising power of the people with satisfaction, as it created a class of men that might protect them from the ambition and supremacy of the nobles. In these circumstances, boroughs began to resume their ancient importance, such as they had enjoyed in the times of the Saxons. Men who had hitherto lived on the land belonging to the lords of the castles, and had sacrificed many

of their liberties for bread and protection from the warlike barons, for whom they had been called upon to fight, now found that by union among themselves in the boroughs, they might secure bread by industry, and protection and liberty by mutual aid. Multitudes, therefore, forsook their feudal subservience to enjoy almost independent citizenship. *Villeins*, (bondmen) joyfully escaped to take their place on a footing of equality with freemen, and in the reign of Henry II., if a bondman or servant remained in a borough a year and a day, he was by this residence made a free man.\* It must be borne in mind that among our Saxon and Norman ancestors, places which were called boroughs at this period, were fenced or fortified. It is evident that the increase of popular liberty and social progress in these boroughs must have been favourable to the developing of the fundamental principle of trial by jury, and that the determination of questions of fact by the people themselves, could be more impartially and thoroughly carried out, in places where the people were protected from the violence of the powerful barons, who lorded it over the country districts. Then again, trial by jury, by the security it afforded against wrong, promoted in its turn the growth of freedom and wealth in the boroughs, and from them a civilizing influence continued to spread over the country. The minds of men becoming more enlightened, the truth of a reasonable method of deciding legal questions was enabled to triumph over barbarous customs among the people themselves. The several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, through the superstitions of our ancestors, who, therefore, invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses. They had a notion that God would always interpose miraculously to vindicate the guiltless.

1. By ordeal; 2. by corsend; 3. by battle. Now-a-days,

\* Chambers.

people may laugh at the idea of suitors, for instance, fighting in a mortal combat sanctioned by law; but one of the laws of William the Conqueror forbid the clergy to fight in judicial combats, without the previous permission of their bishop. To show how deeply rooted the law was at one time in England, it was not, although it had fallen into disuetude, repealed until about 1818. In 1817, a young woman, Mary Ashford, was believed to have been ill-used and murdered by Abraham Thornton, who, in an appeal, claimed his right by his wager of battle, which the court allowed; but the appellant (the brother of the girl) refused the challenge, and the accused escaped, being ordered "to go without day," 16th April, 1818.

If such events took place in 1818, what does the reader suppose must have been the state of things in the Middle Ages. To remedy the evil of suitors fighting out their lawsuits, the trial by the grand assize is said to have been devised by Chief Justice Glanville, in the reign of Henry II., and it was a great improvement upon the trial by judicial combat. Instead of being left to the senseless and barbarous determination by battle, which had previously been the only mode of deciding a writ of right, the alternative of a trial by jury was offered. But the *present* judges of assize and *nisi prius* for administering civil and criminal justice are more immediately derived from the statute of Westminster, in the reign of Edward I.\* These came instead of the ancient justices in Eyre, *justiciarii in itinere*, that had been regularly appointed in 1176 by Henry II. to make their circuits once in seven years for the purpose of trying causes. The establishing of the assize, began a new era in the legal history of England. From this date commenced the real permanent foundation of trial by *judge and jury* throughout the country—the judge to decide the law, the jury the facts. The record of the struggle of the system against its foes would fill a volume. The institution triumphed in the end. In an interesting summary of this subject, a recent writer observes:—

\* Statute, West, 2, 13, Edw. I., c. 80.

"In the time of the Anglo-Saxons a man who sued in the King's Court for lands, refused to be bound by the sentence until his 'peers' had decided his right, and summary justice was visited on those in authority who tried cases contrary to the 'custom,' even then *ancient*. In the days of William the Conqueror, even a bondman, when he claimed freedom, was entitled to a trial by the 'country,' and its refusal to a suppliant implied that he was under the ban of 'outlawry.' Trial by jury was secured to every heir-at-law by Henry II., and extended to every person, without distinction, shortly afterwards. In every suit touching inheritance between Crown and subject, it has always been an imperative right, and the attempt to render its attainment difficult, by 'delay, denial, or sale,' led to the most emphatic passages in Magna Charta. In the days of Edward IV., when a subject had been deprived of a jury by Act of Parliament, the very statute was repealed and the judgment pronounced under it declared void; this being effected under the express provisions of those Acts which 'confirm to the people of England the great Charter of their liberties for evermore,' and which ordain that 'every judgment and every statute contrary thereto, shall be holden for nought.' In the reign of Henry the VII., the Acts which gave certain judges statutory permission to try causes without juries, 'at their discretion,' were set aside—'a warning to all future Parliaments, judges, and others, that they deprive no man of the precious trial by writ of right, or the verdict of twelve men.' In 1620, the *judges themselves* when called on to plead before a tribunal where disputed facts would have been decided without a jury, refused to appear, claiming 'the benefit of Magna Charta, as free Englishmen.' When the Star Chamber tried to overrule and stultify the verdicts of juries, the attempt led to the Petition of Right—that second Magna Charta; and the blow aimed at trial by jury in arbitrary imprisonment and confiscation of property and of civil rights, without that mode of trial, led to revolutions which shook the kingdom to its centre, while all the cruel acts of Jeffreys and other corrupt judges, were followed by reversals of their decrees and the rehabilitation of the families of those whom they had judicially murdered. When the verdicts of juries were perverted, so as to carry consequences which the jurors did not intend, the legislature at length stepped in and placed the law beyond the possibility of future cavil and misconstruction."—*Trial by Jury, the Birthright of the People, &c.*, p. 163.

The reader will thus perceive that the common law is grounded on the general customs of the realm. "Indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom, which carries with it this internal evidence of freedom," writes Blackstone, "that it was introduced by the consent of the people, and has been jealously preserved by them." The common law is the result of long study, observation, and experience; and it has been refined by learned men in all ages. It overrides the canon law, and the civil law, where they go beyond it, or are inconsistent with it. The principle of trial by jury, without alluding to previous compacts, was confirmed by the Act of Settlement (1 William & Mary, c. 2), and declared to be the birthright of the people of England.\*

A word concerning trial by jury in the British colonies and dependencies. Some of them possess the system, others do not. Those which have it are, generally speaking, the most peaceful and flourishing, but the subject is too lengthy for more than a passing remark, on account of savage races of men being mixed up with the white inhabitants in questions concerning land, &c., as in New Zealand, the Cape of Good Hope, &c. The subject of trial by jury in foreign countries does not admit of any detail on account of the limits prescribed to the essay. Neither does this branch of the question effect the arguments concerning the institution in Great Britain. The civil or Roman law, in fact, the institutes of Justinian, to this day, furnish the basis of legislation to continental Europe. In England, the protectorate of the common law has raised an impassable barrier to the invasive spirit of the civil or Roman law. Trial by jury, it is true, does exist in many European nations; but they have at the same time many other laws which take away from its value. In France, for example, the

\* As our Essay is but an outline of the subject, we refer the reader to several learned works for full details respecting Trial by Jury, by Mr. Forsyth, Q.C., Mr. Serjeant Pulling, and Mr. Erle; also to "Hallam's Middle Ages," vol. ii., chap. viii., and to the able treatise entitled "Trial by Jury, the Birthright of the People of England."

"*loi de suspect*" enables a man to be arrested, imprisoned, or transported, merely at the discretion of the authorities, if they *suspect* he may *intend* to commit any act, often a political one, which they might not approve of. In Germany, Italy, the United States, &c., the violent agitation which led to the recent wars, produced many acts of lawlessness and oppression. It is useless, in a short essay like this, to allude to trial by jury in such countries. It is to be hoped that if peace continue, the inhabitants of these countries will seek to work out more carefully the principle of trial by jury, which is the "keystone of British liberty." It is true that in Great Britain and Ireland, when an Act of Parliament suspends the *Habeas Corpus* Act, persons can be detained in prison without having been tried and convicted; but this measure is in force for a limited period only, and in the disturbed part of the kingdom mentioned in the Act of suspension. Moreover, the representatives of the people in the House of Commons would never sanction the suspension of the *Habeas Corpus* Act, were it not necessary for the safety of the realm. It may be as well to explain to the general reader, that *habeas corpus* is the name of a writ, by which every person who is imprisoned before trial, &c., may demand to be brought before some competent court, that he may be either convicted or liberated.

Respecting the beneficial influence of trial by jury on the public, as a national institution—politically, socially, morally—the preceding part of our essay sufficiently explains the political branch of this subject. We shall now proceed to the consideration of the beneficial influence of the institution.

I. The beneficial influence of trial by jury on the judges must be evident to every person who has considered the subject in the spirit of a free-born Briton. It is an old proverb "that two heads are better than one." Solomon, the wise man, has written—not once but twice—that "in the multitude of counsellors there is safety." The strain upon the intellectual faculties of the judges if they were to unite the

functions of judges and jurors, would be undesirable for many reasons. The value of the division of labour is acknowledged in most pursuits, and it is not improbable that if the minds of judges were continually over-taxed, they would not be able to follow all the facts of the multifarious causes brought before them with the same energy as jurymen, whose minds would be less fatigued. Then again, there is the responsibility. Twelve men who can share it between them, are less troubled by the weight of it than one or two men who have to bear it, especially in very perplexing cases—in which the life, or the character, or the fortune of a fellow-creature, depends upon the issue. In such cases, it is not unlikely that a judge of a severe disposition would be too severe, and that a judge of a mild disposition would be too lenient; thus justice would not be so well meted out. In a jury of twelve men, it is to be supposed that there is a greater chance of obtaining men of various dispositions, which would serve to counteract the tendency to an excess of either undue severity or leniency. “In acting for the public,” said a magistrate, “he regretted that the case could not be sent before a jury—for it was always more satisfactory to him to have the opinion of twelve men, than to take the responsibility of deciding himself.”

To prove that in certain cases one man is not equal to twelve men to decide a cause—suppose a jury to consist of *one* man? Is it to be imagined that the results would be as satisfactory to the public, as though the jury were to consist, as at present, of twelve men? Would the *one* jurymen have in all cases the same clear views of the causes?—would he discriminate with the same accuracy?—would he decide with the same amount of judgment?—would he be able to sift the true from the false with the same nicety—since one mind, instead of twelve minds, would be engaged in weighing the evidence, and, in all probability, would not be competent to take so extended a view of the case, and unravel the complications that might exist? It is to be remembered that some cases are very intricate—not only from the result of circumstances, but from artfulness, or



fraudulent designs. In a word, would the public have the same confidence in the soundness of the verdict of this one jurymen, as in that of twelve jurymen? If you—I say to the reader—were a plaintiff or defendant in a cause, would you *prefer* your cause to be decided in this manner? If anyone would not prefer one jurymen instead of twelve jurors, why should he prefer one judge to act alone, instead of twelve jurymen, with a judge to assist them and the case? The same argument will hold good respecting one or two, or more jurymen or judges, deciding causes, instead of the present number as established by law. It may be said that judges are more able and learned in the law than jurymen; and this leads us to the consideration of the question, whether one or more judges to decide trials would not be preferable to having any jury at all—in fact, to abolish the use of a jury, and allow the judges to adjudicate. It has been argued, judges are learned, and jurymen are often, comparatively, very ignorant, or, at all events, they are inferior to the judges in legal lore. It is preferable, some may say, to rely upon the decisions of men profoundly skilled in the law. Sir John Hawles, who was solicitor-general in the reign of William III., observes in a celebrated work of his:

“Though judges are more able than jurymen, yet jurymen are likely to be less corrupt than judges—especially in all cases where the powers of the prerogative and the rights of the people are in dispute. . . . Less danger will arise from the mistakes of jurymen than from the corruption of judges—besides, improper verdicts will seldom occur; since juries will avail themselves of the abilities and learning of the judges, by consulting them on all points of law—and thus, to the advantage of information will be added that of impartiality. . . . Had our wise and wary ancestors thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of juries.” “Although we live at present under a benign government,” says a modern writer, “and our Crown lawyers—Liberal or Conservative—are pre-eminent for private and public integrity, yet Lord Brougham and Lord

Lyndhurst, and other great statesmen, have warned us that it 'may not always be so.' *Trial by Jury, the Birthright of the People of England*, p. 81.

The salutary effect of juries saving judges from the temptations and unpleasant positions which might occur to them if they were allowed to decide all cases without juries, could be proved in many ways. When judges were removable at the pleasure of the Crown, history records that many judges were not exempt from the human infirmity of preferring their own personal interests to those of justice and of the public. They feared to lose their places. It is far from satisfactory for a judge to decide, in times of great political excitement, in trials for political offences. In the trials of the Fenian conspirators, for instance, what a benefit it was to the judges to have a jury to decide upon the facts of the cases. Trial by jury serves, in a great measure, to protect the judges from the imputation of partiality, and, in any case, does not require them to act contrary to the wishes or political bias of the government which appointed them. If they were to have the power to acquit, they might offend the government, or the class to which they socially belong; if they could convict, they might become odious to a large section of the people. It may be said that as a judge is not in the present age removable, he has no inducement to act otherwise than with strict impartiality; but he may have sons and daughters, the sons to advance through interest in high quarters, and the daughters to marry in a certain class. There would be high minded judges to despise all unworthy acts, but the cases of two of the king's justices, Empson and Dudley, together with the infamous conduct of Judge Jeffreys, are warnings not to expose even judges to unnecessary temptations. Some of the judges themselves have given a convincing practical proof of the superiority of trial by jury over that by judges only. "In 1620," relates a writer, "the conduct of Chief Justice Holt and his brethren in the Queen's Bench was called in question by Lady Bridgeman for an alleged illegal act in the course of a suit. These judges were summoned to appear before the

House of Lords. They refused. Why? They denied the jurisdiction of the House of Lords, and insisted upon their undoubted rights as Englishmen to a trial by jury of their equals, in case they in anything were accused of having done wrong, and claimed the benefit of being tried according to *the well-known course of the common law.*"\* If judges have thought it not prudent to be tried except by a jury, it is certain that other persons ought to think the same.

II. The effects of serving on a jury upon the class from which common jurymen are taken, must be very advantageous to the well-being of a nation.

We suspect that a free constitutional country could not continue to exist in the same state of freedom and order, if the practical education which serving on a jury confers, were withdrawn from so large a portion of its inhabitants. A jurymen indirectly gains invaluable knowledge from the duties that he is obliged to perform. He acquires a knowledge of men, manners, and things; he learns to make a due discrimination between right and wrong, between truth and falsehood, and is imperceptibly taught to recognise the difference which there is between arbitrary power, and liberty and order. Then again, the distinction which there is between liberty and license is forced upon his notice. On the one hand, he feels himself called upon to shield his fellow-countrymen from wrong and oppression, whether from the government or individuals; on the other hand, he equally sees himself called upon to prevent persons setting order and just dealing at defiance. Hence the jurymen, with his mind thus disciplined, is better able to form sound opinions upon political and social matters, and to become a loyal, but free and order-loving member of the community. He instinctively respects the constitution and the laws of his country, because he is aware that he himself has often assisted to support the former and to administer the latter. He may be a reformer, but he has learnt from his past experience as a jurymen, that to adopt the

\* "Trial by Jury, the Birthright of the People of England," p. 106.

legal means at his disposal is the only proper method of carrying out his views.

In criminal trials especially, the juryman is taught an instructive lesson which may well serve to make him a better man, in case he should need it. He sees the dire consequences of guilt in the miserable criminals brought before him, and a solemn warning is thus given to him, which he cannot well reject, if he be a man of ordinary thoughtfulness, that "honesty is the best policy."

The intelligence and general knowledge of a juryman are greatly increased by the nature of the proceedings in a court of justice. The judges and the lawyers are well educated men. The pleadings of the lawyers, and the summing up of the judge in a trial, must certainly convey instruction and teach a lesson on the right use of words, likely to improve an ordinary juryman, and extend the narrower bounds of his thoughts and language.

III. The overwhelming disadvantage to suitors and prisoners, of having their cases tried by judges only, instead of tried by a jury, would be that both the facts of the case and the law would be in the same hands. The meaning of the famous legal maxim, "Fact for the jury, law for the judges," ought to be thoroughly understood by everybody. The office of the judge is to explain the law to the jury, and state his view of the case in his summing up, which must not contain his verdict; but since "all matter of law arises out of matter of fact," so till this point be settled by the jury there is no room for law.\* After the verdict has been given by the jury, the judge carries the verdict into effect according to the law of the land, or in other words, pronounces the judgment which the law makes the consequence of the verdict.

The celebrated Blackstone gives the following reasons for the superiority of trial by jury over that by judges only:—

"If the administration by justice were entirely entrusted to the

\* Chief Justice Vaughan—Bushell's case.

trial may come on in the interval, and he himself fined for his absence. He may be chosen on a coroner's inquest, 'sit' on a body, and get nothing at all for his unpleasant task. As if to render the evil intolerable, the lists from which jurymen are selected, are made out with the most capricious irregularity. One man will be summoned twice or thrice every year ; another will escape for ten years, or even longer, although he has taken no steps to evade the duty. Now, there are a good many citizens who do not object to take their share of the work, but who grumble at being burdened with double labour, while their neighbours are never called on to perform the task. There are others who considered it such a nuisance that they think almost any means of escape lawful. Now, the wrong might be easily remedied, and its amendment is a mere question of detail. Let the lists be fairly made out and exhausted in rotation, and the willing class of jurymen will have their objections removed, while the reluctant or selfish will have no shadow of excuse for shirking the performance of a necessary duty. We simply take the institution as one which has in practice worked admirably, and proved an efficient bulwark against the encroachments of prerogative and power. Such being its worth, we are bound to see that nothing interferes with its successful working. Bad management, irregularity, and uncertainty have created a dislike to the system, when the fault really lies in the administration alone. The area of selection should be widened, and no room left for the operation of favouritism or neglect. If all citizens who are liable and qualified were to perform their proper share of so important a public duty, the labour would not press unduly on a small number, and there would be less temptation to shirk it."

It is also related that "judges on the bench, responding to complaints from indignant jurymen, have expressed their opinions very freely on their subject, and their views on the necessary reform point in the direction we have indicated." We admit at once that the judges are much more competent than we are to form sound opinions respecting the matter ; but it occurs to us, that the principle of volunteering which has worked such wonders in raising a national force of volunteers to defend the nation, might be extended to the system of

forming juries. As is well known, all men are not gifted alike, some can scarcely arrive at a correct opinion about their own affairs, much less concerning those of other people; others feel themselves almost physically and mentally incompetent satisfactorily to undertake the weighty task of passing a verdict upon disputes and crimes often of the most puzzling nature. There are, on the contrary, men who are clever at this kind of work, and who feel their own powers: very frequently they are not averse to undertake the duty. If an appeal were made to the inhabitants of every district for volunteer jurymen, it is not improbable that many would be found willing to come forward. If after this any deficiency in the requisite number of jurors were to occur, the lists of those liable to serve ought to be exhausted in rotation, and the required number made up. It would be probable, that by these means, a large proportion of willing jurymen who feel themselves mentally able to undertake the duty efficiently, would be secured with advantage to the interests of justice and to those of the community. At the same time, it is to be recommended that jurymen be better paid to recompense them for their loss of time, and divest them of the feeling, too prevalent among them, that they are shut up "in a box, whether they will or not, until they do 'well and truly try' some case or other possessing for them not the slightest earthly interest."

It is a strange anomaly in our laws, that one of the most important duties performed in a trial by jury is so inadequately remunerated. The judge is well paid, the lawyers are highly feed, but the jurors, who do so much, are scantily rewarded for their services. It is true that, a special jurymen receives a guinea for the case he tries, but he has to be in attendance until the trial shall take place, and he may have to wait a considerable space of time. The number of judges and of the courts, above all in the metropolis, are insufficient, particularly for special jury cases, and many causes have to wait too long until their turns come. The number of the judges and of the

courts that sit have not been augmented to meet the increase of population, and consequently of causes. No persons other than those who have had to endure the hours and even days of weary, profitless waiting connected with a trial, can form a conception of the loss of time it may involve. We are of the opinion that jurymen ought to be properly paid. The payment of jurors is not a modern innovation. We read in Roberts' *Southern Counties*, that in 1485 (Richard III.), "there is evidence of payment to the jury for their expenses and labour, and for breakfast after they had delivered their verdict." There is a happy medium even in remunerating a jury; our opinion is, that jurymen ought to be paid for the time they really lose. With a stronger staff of judges, and additional courts to sit in, the waiting for the trials to come on in turn would be abridged, and so great a loss of time avoided.\* We are not in favour of a uniform rule of payment to members of the same jury. \*Let each jurymen be paid according to his station in life and calling, and in conformity to the scale of payment to witnesses in criminal cases—so much a day for a gentleman and a professional man—so much a day for a tradesman, &c., and so much a day for a mechanic, &c. This would save needless expense, meet the requirements of the case, and arrest the growing dislike of people, who may have pressing affairs of their own which demand their attention, to serve on juries. The time may come when the popular dislike to an ill-paid, forced service, may endanger the stability of the institution. The jurymen of 1485, was paid "for his expenses and labour," why should not the jurymen of 1866, &c., be paid a reasonable amount for his services.

In reference to the question, as to whether the age at

\* We had written our Essay and sent it in, before the Government announced that the number of the judges are to be increased. The numbers of suits which are constantly deferred on account of the lack of judges to hear them, are too numerous for any half-measures to be effective. Some of the judges have also to preside in criminal cases, which creates delays in civil actions; and many suitors are, as it were, forced to avail themselves of county courts to obtain more speedy justice: this militates against trial by jury.

which jurors can claim exemption should be made sixty-five instead of sixty, we hold that men of sixty-five, as they generally possess more experience in worldly matters, and are often in more easy circumstances than younger men, should be made to serve, provided they be properly paid and selected and allowed the requisite refreshments which their time of life demands. Judges are not disqualified at sixty, why should jurymen? but perhaps they ought to be exempted from serving on criminal juries, as the strain upon their nerves, likely to be weakened by age, might injure their health if the responsibility of deciding upon the life or death of a fellow-creature were to be incurred by their verdict. It is to be remembered that a judge does not decide such questions in a jury-box.

As to whether unanimity should be required for a verdict, there is much to be said for and against it. In Scotland, where an ordinary jury is composed of fifteen men, unanimity is not required; but it is to be recollected that in Scotland, trial by jury is not used in many cases in which it is employed in England. Whether from this or other causes, trial by jury is not generally so highly esteemed there as in England. In criminal trials, as the writer has seen, the effects of some of the jury being for a verdict of *not* guilty, and of others of the jury being for a verdict of guilty has sometimes an unpleasant result. If the majority of the jury bring in a verdict of guilty and a person is condemned to death, or some severe punishment, doubts are excited in the minds of some of the community, as to the guilt of the prisoner. "Some of the jury said he is not guilty, why are they not right, and the others who said he is guilty, wrong!" is the argument. In fact, the same individual is pronounced to be guilty and not guilty, by different members of the same tribunal. He cannot be both. Does not the dignity of the law suffer from this indecision in a court of justice. It is very difficult to get men to agree in a unanimous verdict, when the law allows some of them to shelter themselves from moral responsibility, and throw it upon others



of a more determined frame of mind ; it permits the timid to cast an undue burden upon the conscientious, when either an unpleasant or unpopular duty ought to be performed, in addition to which, if a prisoner is acquitted, and a minority of the jurors are for a verdict of guilty, a needless stigma will remain upon him, perhaps unjustly. Besides, in times of great popular excitement and agitation, the majority of a jury if they convict a popular person may be specially singled out for public execration, insult, probably persecution, because the minority of the jury thought the prisoner *not* guilty. Party spirit would seize hold of the opinion of the minority to justify an accusation against opponents. The good men among the jury thought him not guilty ; the base, corrupt ones found him guilty. Such are the arguments likely to be used. Now, if a jury of twelve men must agree either one way or the other, the whole jury is blamed or not, and there is no opportunity of proving the guilt or innocence of any one who has been tried, by citing a division of opinion among the jury. There is unanimity either one way or the other, and the public are spared the doubts and controversies which the other system is capable of giving rise to. We suspect that one of the reasons why our ancestors in England insisted upon unanimity,\* was that it made it less easy for those in power, or others, to tamper with the jury. It is easier to find out and bribe seven men than twelve. If none of the drawbacks we have indicated have ever attended a verdict by majority in Scotland, it is to be considered that Scotland has a very small population, and some of the elements of discord are not very strong among them. Transport the scene into Ireland, and the results might be different. Nevertheless, as a verdict by majority does, in its turn, possess its merits, we think it might be adopted in England ; not as a matter of compulsion, but of *option*, in civil cases at first, to see how it would work. If both sides were agreed, suitors might be allowed it.

\* Debate between Lord Campbell and Lord Lyndhurst. 1859. Hansard's Parliamentary Debates, vol. 150.

A word to those who would evade their duties as jurors. If you, we say to them, dislike to serve on a jury to settle the affairs of your fellow countrymen, you should bear in mind that other people are liable to be called upon to settle your affairs. You cannot say how soon. You might be ill-treated, robbed, run over, injured in some railway or other accident; any one of you might meet with some suspicious death, or die suddenly. Juries would be required to mete out justice in your respective cases. How mean of you to require that of others in public matters which you will not, if you can help it, perform for them. If you are deaf to this appeal, it is almost useless to mention it to you as one of the duties which you have to perform as members of a great nation. We may add, that if the nature of the duties should make you reluctant, it requires no learning to perform the functions of a juror. "It requires no more than a coolness in thinking, and a mind above being carried away by prejudices or feelings. The juror is to remember that it is the jury which is the judge as to the *facts* of the case, not the judge who sits on the bench. It is the duty of a juror to be totally regardless of every consideration but that of strict justice. He should make up his mind to do *what is right*. He is neither to regard the rank in life, nor the wealth of any suitor, or prisoner. In a court of justice all men, under these circumstances, sink to an equality. A juror, after he has formed his conscientious opinion, ought not to allow himself to be coerced, or flattered, or persuaded by the talk of others, into a different opinion. He is invested with a solemn trust, and this trust he must preserve with scrupulous care, as consonant with the dearest interests of society."—*Chambers*.

Respecting what classes of men, not now eligible to serve as jurors, should be admitted to serve, it may be observed that great caution is required to prevent men, who have no property, deciding questions which relate to disputes about property, claims, debts, damages, &c. It is simply because

having no property of their own to manage, they are not versed in any details concerning such matters.

It may be said "Who talks of destroying jury trial? It may be answered that the tendency of county and of some other courts is to gradually bring it more and more into disuse. We are of the opinion that the legal profession would greatly increase their business, if trial by jury in civil cases was rendered a cheaper and a more expeditious process. How to explain this, would be matter enough for a separate essay.

The remarkable union of a learned judge and an independent, impartial jury to decide a cause, has taken away all real grounds for any sneers at them as an ignorant tribunal. Such a tribunal, which has withstood the storms of centuries, is not the issue of the prudence of this or that council or senate, which perfected it in a day or in a year; but it is the production of the various experiences and appliances of the wisest thing in the inferior world, to wit—time, which, as it discovers day by day new inconveniences, so it successfully applies new remedies; "so that (continues Sir Matthew Hale) it is a great adventure to go about to alter it, without very great necessity, and under the utmost demand of safety and convenience imaginable."

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## ART. II.—MARTIAL LAW.

*Charge of the Lord Chief Justice of England to the Grand Jury, in the Case of the Queen v. Nelson and Brand. London: 1867.*

TO every lawyer who has any regard for the sound principles of constitutional liberty, the charge of the Lord Chief Justice of England, in the case of *The Queen v. Nelson and Brand*, must have given much satisfaction. It cannot, indeed, be said that there was any real doubt in the minds of those who had directed their attention in a fair spirit to the

subject, as to the legality of what is called "martial law" when put in force against civilians for the purpose of suppressing rebellion; but from the circumstance of such a system having been unknown in this country since the Petition of Right, and the question therefore never having been formally raised in our courts, the matter had fallen into a certain state of obscurity, and views more or less inexact, favoured by the loose expressions of text-writers, had to some extent prevailed. Enjoying perfect security in this country from the evils of martial law, there undoubtedly existed a disposition amongst us to disregard the violations of English law in connection with this matter which occasionally took place in the colonies. We believe that we were the first to point out in an article in this Journal, in 1861,\* on "Martial law in Australia," the illegal character of such proceedings; and we frankly acknowledge that it affords us much gratification to find that the views which we then put forward with perfect confidence in their soundness, although the general impression might be against them, have received the full sanction of the Chief Justice, and have been vindicated by him in a manner which must command the respect of all sound lawyers and all reasonable men. We know no instance in the history of English law, in which a delusion has been more completely scattered to the winds, since the time when Lord Camden's celebrated judgment in *Entick v. Carrington* finally disposed of general warrants.

Of course a charge addressed to a grand jury is only to be considered as expressing the opinion of the judge who delivers it; but we are very much mistaken if in any case where the legality of martial law should again arise, the principles laid down, the authorities appealed to, and the line of argument adopted by the Chief Justice in his memorable charge, were not followed by any judge on the English bench, as long as the law of England remains what it is. A more valuable and sound exposition of the law on a great constitutional question

\* *Law Magazine and Law Review*, Vol. XII., p. 170.

is not to be found in all the books of our law, replete as they are with great judgments, to which Englishmen are proud to appeal. Without anything of the pedantry or affectation of antiquarian research, it gives a full, clear, and accurate account of the history of the matter—it displays a comprehensive and enlightened understanding of the true principles of the constitutional law of England, and it is marked throughout by a hearty sympathy with those wise and liberal views on which our law is founded, and with that spirit of humanity which, in later times at least, has characterized its administration. The charge of the Chief Justice is in all these respects worthy both of his own high reputation, and of the high position which he fills. If there is any part of the charge which we could wish otherwise than it is, it is the crushing reference to Mr. Finlason's unfortunate publication. We feel profoundly that the *escapade* of that learned gentleman was scarcely *dignus vindice nodus*. Of course Mr. Finlason's eminent disciple—the Chancellor of the Exchequer—was fair game. Any mis-statement of the law of England by a cabinet minister on a point of minor importance would scarcely deserve the animadversion of the Bench, but when the leader of the House of Commons took upon himself to lay down doctrines so vitally opposed to the principles of the constitution of this country, as the Chancellor of the Exchequer did on martial law, in his place in Parliament, during last session, it was only right and becoming that the Chief Justice of England—the guardian of the common law—should expose without fear, and without favour, the illegal character of such doctrines.

It is to be regretted for some reasons that the Chancellor of the Exchequer did not take advantage of the recent discussion on martial law in the House of Commons, to recant his former heresy, and to explain for the benefit of posterity that his opinion had always been that which the Chief Justice had expressed on the subject. On that occasion Mr. O'Reilly rose,—

“To call the attention of the House to the law as laid down by the

Chief Justice of England in his charge to the grand jury at the Central Criminal Court, on the 10th April, 1857, in which he declared it to be the unquestioned and unquestionable law of the land, that no English subjects can be subjected to martial law, and also to the statement made on the 11th March by the Secretary for the Home Department, that the Government had not the intention at that time of proclaiming martial law, and hoped there would be no necessity to proclaim it."

He moved the following resolution—

"That whereas, by the law of this kingdom, no man may be forejudged of life or limb but by the lawful judgment of his peers, or by the law of the land; and no commission for proceeding by martial law may issue forth to any person or persons whatever, by colour of which any of her Majesty's subjects may be destroyed or put to death contrary to the laws and franchise of this land, and the pretended power of suspending of laws, or the execution of laws by regal authority without consent of Parliament is illegal; this House would regard as utterly void and illegal any commission or proclamation purporting or pretending to proclaim martial law in any part of this kingdom."

There can be no doubt that the recital in Mr. O'Reilly's resolution embodied the sound legal view of the subject, as year after year enunciated in the Mutiny Act; and this was generally admitted by those who took part in the debate, although with some carping and quibbling as to the charge of the Chief Justice on the part of Mr. Gathorne Hardy; but the difficulty arose as to the declaration which the resolution embodied. It was not attempted to be denied that this declaration was legally correct. But Mr. Headlam pointed out that by interfering in the manner proposed they would be going beyond the function of the House, and be doing nothing to strengthen the law. Mr. Cardwell, after a clear statement on the subject of martial law, expressed substantially the same view as that of Mr. Headlam, with respect to the resolution before the House, and Mr. O'Reilly thereupon consented to withdraw his resolution. The debate

was on the whole satisfactory, as showing what the feeling of the House now is on the subject; and the general tone throughout, leads us to believe that such sweeping statements as those made by the Chancellor of the Exchequer last session, would not, after the light that has since been thrown on this question by the charge of the Chief Justice, be likely to be well received. It cannot be said, however, that any of the speakers showed a thorough comprehension of the true bearings of the question in all its legal relations, or distinguished exactly between that which the law allows, and that which, though not sanctioned by the law, may be justified on the ground of necessity. We regret that, neither the former, nor the present law officers of the Crown, nor any of the leading legal members of the House, took part in the discussion.

Availing ourselves of the information and arguments contained in the charge of the Chief Justice, we propose to state in a succinct manner, what the law on this matter really is, and to consider briefly the recommendation of the grand jury at the Central Criminal Court, that martial law should be more clearly defined by legislative enactment. We throw aside for the present all reference to the Jamaica case, or to the exercise of martial law in the colonies, confining ourselves merely to the general question.

Now the first proposition which may be laid down as unquestionable is, that the law of England recognises no mode of proceeding against any persons guilty of any offence of a public nature—for it is unnecessary to advert to offences against individuals—whether against the Queen and her government or against public justice or against the public peace, except by indictment or by a summary proceeding before magistrates, when the latter mode is allowed. The power of a judge of a court of record to commit for contempt is no doubt an exceptional case, and so also is the power given by the Mutiny Act and the Naval Discipline Act to courts-martial to try persons in her Majesty's military or naval services for certain offences; but these exceptions are clearly defined and

fully ascertained, and in reality they serve only to strengthen the broad proposition above stated. This from the earliest period of our legal history has been a great leading principle of the law of England, which, if it has occasionally been violated, has always been re-asserted in a manner which has only served to render it more emphatic and distinctive.

With respect to the subject of martial law, it is quite unnecessary for any practical purpose to go further back than the Petition of Right. That celebrated enactment is declaratory in its character, and it must be taken therefore that whatever was done in previous reigns which may seem to favour an arbitrary mode of proceeding in cases of rebellion, was clearly illegal. The Chief Justice has reviewed in a most luminous and satisfactory manner all the previous instances of this nature, and has shown conclusively, with reference to acknowledged principles of our law, that they were founded only on an arbitrary assumption of power on the part of the Crown. The trial of the Earl of Lancaster in the reign of Edward II., before the king and a certain number of his peers, appears not to have been connected with martial law at all, and at all events the attainder was reversed in the subsequent reign on the ground that the whole proceeding had been irregular. In the reign of Richard II., it appears that after the rebellion of Wat Tyler had been put down, numbers of his followers were executed without trial of any sort; but here an Act of Indemnity was passed for these irregular executions. During the Wars of the Roses, it was customary for each party when successful in battle to execute without form of trial the prisoners who fell into their hands; but these were mere acts of vengeance, as to which there was no pretence of legality. The proceedings under Henry VII., after the defeat of Simnel, were utterly illegal, and can be defended on no principle on which martial law has ever been attempted to be justified. The commissions of lieutenancy of Edward VI. and James I. were clearly illegal. The commissions issued by Charles I. were equally opposed to the fundamental principles of English



law; and the Petition of Right only asserted a matter as to which no sound lawyer could have any doubt, whatever instances to the contrary might have occurred.

It is unnecessary for us to quote here the language of the Petition of Right relating to this subject, but referring our readers to that celebrated document, we submit that it most positively and explicitly prohibits the exercise of martial law against the ordinary subject, under any circumstances and conditions that may arise. It refers to martial law "as is used in armies in time of war," and this it does not prohibit, leaving it as it was before; but it clearly prohibits martial law even with respect to soldiers in any other time. And the Mutiny Acts which have been annually passed since the Revolution, reciting as they do this declaration, prove that since that time this has always been considered to be the case.

"It is certain," says the Chief Justice "that, whilst the Crown has absolute power to legislate for the government of the army in time of war, though not, except under the Mutiny Acts, in time of peace, it has no power, whether in time of peace or time of war, to legislate in respect of the ordinary subject. How then can the Sovereign have power to declare martial law as against the subject? Yet to declare martial law is to legislate. It is neither more nor less than to enact that the law of the land shall be suspended and a different law substituted for it. Whether this be effected by Act of Parliament, or by the proclamation of the Sovereign, it is equally legislation. How is this consistent with the indisputable principle that the Sovereign can only make laws in Parliament with the concurrence of the other estates in the realm? How is it consistent with the sacred principle of the Great Charter, that no man shall be tried except by his peers and the law of the land?" pp. 69, 70.

It is said, however, that the Petition of Right does not apply to time of war. But even admitting this to be so, the question is, whether a state of rebellion, except with respect to those actually in the field, is a time of war, as the term is used in the Petition of Right? We venture to think that it is not, and that as long as the courts are open, or in other words, as long

as the ordinary civil justice of the country can be administered and executed, it is not a time of war. It is simply ridiculous to say that if certain persons in the community are guilty of treason in levying war against the Sovereign, this constitutes a state of war for the whole community, and that the Crown is thereupon entitled to consider the ordinary administration of justice as in abeyance. The law of England is not so tender a plant as to require to be put under cover the moment a storm arises; nor, to use a figure perhaps more applicable to the case, it is not so weak an engine as to break down as soon as any extra weight is put upon it. But as long as the law is in force, the Petition of Right is in force; and the only necessity which would justify the suspension of the Petition of Right, must be a necessity which would compel the suspension of the whole law of the land. A case of this nature is no doubt conceivable. The rebels might be in possession of the courts and gaols; the judges and the magistrates throughout the country might be imprisoned, and the officers of the courts scattered no one knew where; the members of the Bar might be displaying their devotion to the Sovereign and the law on the field or in the fortress, and the attorneys might have fled to foreign parts, or have hidden themselves in obscure retreats. Such a state of matters is, as we have said, conceivable; but, as far as we know, it has never occurred in our history within the time of legal memory. The Chief Justice, in a note, p. 70, says:—

“There is, however, I believe, no instance in English history in which the administration of justice has been suspended by reason of civil war. It certainly was not, according to Lord Coke, in the wars of Henry III., or during the wars of the Roses, or during the great civil war.”

If any district of the country were in such a state of disorder that the law could not be executed, it would be the duty of Parliament to pass an Act providing for the emergency. In such Act it would be necessary to define, with some amount of precision, the authority that was to be exercised, and the offences that were to be dealt with. Of course, Parliament

might give a general power to courts martial to deal with all matters as they thought proper, but it is unlikely that any legislature acting on sane principles would concede any such authority.

With regard to a state of matters in which justice cannot be administered by the ordinary tribunals, neither the common law nor the statute law of this country has any provisions, any more than it has for a vacancy of the throne, or for a dissolution of the government. Such cases, in the words of Blackstone, "must necessarily be out of the remedy of any stated rule or express legal provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies," 1 Bl. Co. 245. Martial law, therefore, as a means of restoring order in extreme cases is not in any way recognised in our legal system. At common law, as declared by the Petition of Right, it is only applicable to armies in time of war, and the Mutiny Acts and Naval Discipline Act only allow it in time of peace, with respect to those in the military and naval services of the Crown. To suppose that there is such a thing as martial law, which in certain circumstances is entitled to supersede the law of England, is a piece of sheer folly; and to attempt to state what those circumstances are, and to spin out a miserable theory of what may be done under such a system, in defiance of all the rules of justice, all the principles of evidence, and all the dictates of common sense, is the most profitless and absurd task which any human being ever attempted to accomplish. Should an emergency arise which would render it necessary to supersede the ordinary law, it must be met in a very different spirit—in a spirit which, however resolute and determined, would not disregard the dictates of humanity and justice, and which, while acting with vigour with respect to present necessities, would have some thought of the past and some regard for the future.

In a case of rebellion, which did not involve a suspension of the ordinary law of this country, it would be the duty of the government to take effective measures for the suppression of

such rebellion. This is no matter of prerogative, but is a matter of duty arising simply from the position in which the executive government is placed. It has no more connection with any system of martial law than the means taken to suppress a mutiny on board of ship. or in the army. It is simply as the Chief Justice says—

“The application of a universally acknowledged principle; namely, that where illegal force is resorted to for the purpose of crime, you may meet that illegal force by force, and may repress and prevent it by any amount of force that may be necessary for the purpose, even if that necessity should involve the death of the offender.”

Such an application of force is implied in all systems of law, and even directly sanctioned, but in every instance it must be limited by the necessity of the case. There is no authority given to any one in a case of rebellion to subject persons not actively engaged in it to an arbitrary system which disregards all the safeguards which the ordinary law provides. An Act of Parliament authorising such proceedings might render them legal, or an Act of Indemnity might free from punishment those who had adopted them; but independently of these there would be no pretence or colour of justification for those who had adopted such a course. As to any prerogative of the Crown to authorise a system of this nature, there is no real ground of law for any such notion. The Crown has no right to suspend the common law on any view of expediency, whatever obligation it may lie under to take all necessary measures for the restoration of public order, when the circumstances have, *ipso facto*, suspended the common law. The Petition of Right is perfectly explicit on the point, and all previous instances of royal authority exercised for this purpose, must clearly be considered as mere usurpations. The prerogative of the Sovereign to make regulations for the army in time of war is a matter of an entirely different nature, and has nothing whatever to do with such a condition of things. With respect to the Irish Act, 39 Geo. III., c. 11, or the Acts of the United Parliament, 43 Geo. III., c. 117, and 3 & 4 Wm. IV., c. 4., we have only to

observe, that it is utterly impossible to give to mere recitals and saving clauses a declaratory or enacting force sufficient to overthrow the most essential principles of the constitution of this country.

But while the Crown has no power to proclaim an arbitrary system of law in substitution for the common law of England, and thus to exempt those acting under such arbitrary system from inquiry into their conduct when the ordinary state of things is restored, the Crown has no doubt the right, and is indeed bound from the position which it occupies, to put down rebellion by force, and to treat subjects who are arrayed in arms against it as public enemies, when they really deserve to be viewed in this light; and where this is not carried further then necessity requires, those who act in suppressing the rebellion by all the ordinary means of warfare, will be able to justify their conduct if it be called in question in a court of law. But such persons, however pure and patriotic their motives may be, possess no absolute discretion to do, or to direct to be done, whatever they may think most suitable for the restoration of peace and order. Their duty is to suppress force by force; but they have no right to punish offences which in their judgment may have contributed to the rebellion, far less to give whatever character they choose to such offences, and to disregard *intent* as the primary ingredient of criminality. Still more monstrous would it be to suppose that for the purpose of striking terror, they are entitled to punish any one who may fall into their hands against whom any charge of disaffection, supported by any sort of evidence, may be brought. To quote the words of Coke in the debate on the Petition of Right, which have been so often referred to in the recent discussions on this subject,

“To hang a man, *tempore pacis*, is dangerous. I speak not of prosecution against a rebel, he may be slain in the rebellion; but if he be taken, he cannot be put to death by the martial law.”

To the same effect is the language of Rolle, afterwards Chief Justice, in the same debate. “If a subject be taken in rebellion,

if he be not slain in the time of his rebellion, he is to be tried after by the common law." It may appear at first sight, that the view expressed by the Chief Justice in his recent charge, rather contradicts what is stated by Coke and Rolle, although he afterwards quotes them with approbation. He says—

"We are dealing with the case of rebels killed on the field of battle, or put to death afterwards without any trial at all. A rebel in arms stands in the position of a public enemy, and therefore you may kill him in battle as you might kill a foreign enemy. Being in the position of a public enemy, you may refuse him quarter—you may deal with him in this respect also as a foreign enemy," p. 25.

But it is obvious that the Chief Justice is only speaking here of what may be lawfully done on the field of battle with respect to killing a public enemy—refusing him quarter—if that be justified by the laws of war, although he uses the expression "or may be put to death afterwards without any trial at all," but Coke and Rolle are speaking of those who have been taken prisoners, and treated as prisoners, and who are therefore entitled to a trial by the common law. When persons who have been guilty of levying war against the Queen are made prisoners, and put in safe custody, the only proper mode of dealing with them, is to try them for high treason in the ordinary way, and this is precisely what both Coke and the present Chief Justice mean.

The truth is that martial law as connected with the right of the Crown to put down rebellion is an entire misnomer, and the use of the expression is founded on a complete misapprehension. In former times there was the law martial exercised by the High Constable and the Earl Marshall over troops in foreign service, or actual warfare. This jurisdiction formed a regular and recognised part of the general law of this country, and proceeding as it did in a summary manner, it was on various occasions attempted to be introduced by sovereigns for the purpose of putting down insurrection, although without any

legal authority. Nothing was more natural than that such attempts should be made when emergencies arose, but they never had the slightest sanction from the law of this country, which recognised the law martial only in one limited and definite aspect. Martial law in the original sense is now obsolete, being superseded by military law, and as applied to the putting down of rebellion, is declared illegal by the Petition of Right. Notwithstanding this, however, the expression "martial law," as Mr. Edward James, Q.C., and Mr. Fitzjames Stephen observe in their opinion—

"Has survived, and has been applied, as we think, inaccurately and improperly, to a very different thing, namely, to the common-law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection."

With this, the view of the Chief Justice entirely coincides. It will be presently seen from an examination of what Hale says on the subject, that he had no conception of martial law, except as applied to the government of the army in time of war. When the Crown uses military force to suppress an insurrection, it no more puts martial law in exercise, than a magistrate does, who, under the Riot Act, calls on the nearest troops to aid him in restoring order. The statute law sanctions the latter proceeding, and the common law the former, but neither the statute law nor the common law sanctions the introduction of any new system of law which is to supersede the ordinary mode of dealing with persons guilty of treason, felony, or misdemeanour. The Crown has no more power in the case of an insurrection to proclaim martial law than it has to proclaim the laws of Draco or the *Lex talionis*. Even when Parliament, in the case of a rebellion, authorises the exercise of martial law, it is not to be supposed that the system thereby sanctioned is to be one of an entirely arbitrary character. Some provision must be made as to the constitution and jurisdiction of the courts which are to exercise authority, and the jurisdiction so conferred, in the absence of any enactment expressly defining the offences to be dealt with, must be taken

as limited entirely to the suppression of the rebellion by means which are necessary for that purpose.

It may be convenient here to quote the observations of Hale on martial law, as showing the real nature of the system, and its very peculiar and limited character. After explaining the jurisdiction of the Constable and Marshall as to matters of war, he goes on to say—

“But touching the business of martial law, three things are to be observed, viz. :—

“First, that in truth and reality it is not a law, but something indulged, rather than allowed, as a law ; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance—*quod enim necessitas cogit defendit*.

“Secondly, the indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others ; for others who were not listed under the army had no colour or reason to be bound by military constitutions, applicable only to the army whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were time of war.

“Thirdly, that the exercise of martial law whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the King’s Courts are open, for all persons to receive justice according to the laws of the land. This is, in substance, declared by the Petition of Right, 3 Car. 1—whereby such commissions and martial law were repealed, and declared to be contrary to law ; and accordingly was the famous case of Edmond Earl of Kent, &c.”—*Hale’s History of the Common Law*, chap. 2.

Now this statement by Hale is of great importance, not only as being obviously the foundation of Blackstone’s fuller, but not more accurate, account of the system, but also because it entirely excludes the notion of there being any power to proclaim martial law in substitution for the ordinary law of the land. The first proposition undoubtedly refers to the circumstance that martial law, as then known, was not a fixed system



like the canon law or the civil law, but a mere collection of rules and orders "composed" by the king, preparatory to an actual war, and which might, therefore, vary under different circumstances. From the necessity, however, of government in the army, martial law, though not in reality a law, occupied a similar position to the canon and civil laws, which were *leges sub graviore lege*, although it might be properly said that whilst these two great systems of jurisprudence were "allowed" the former was only "indulged." After carefully considering the whole of the chapter in which the passage occurs, this appears to us to be the correct interpretation of Hale's first proposition. But whatever ambiguity may attach to it, it clearly refers only to the government of the army in time of war, and has no connection whatever with the application of a peculiar system of law to the repression of civil disorders. This indeed is expressly stated in the second proposition; and it would be impossible to conceive language more clear and explicit on the point. Those who were not listed under the army, "were to be ordered and governed according to the laws to which they were subject, though it were a time of war," and surely it would be the same in a time of rebellion. Of course, those who put themselves in the position of public enemies would be subject to martial law in the same way as foreign enemies—for this law was to extend to members of the army and those of the opposite army; but if such persons were taken prisoners and so deprived of their character of belligerents, they would then, according to the express statements of Coke and Rolle, be punishable only by the common law; and nothing here said by Hale is opposed to this view. Martial law is considered by Hale as only applicable to the government and discipline of the army in time of war, and it extends only to the army of the sovereign or to those of the opposite army. The third proposition refers only to those in the army, all others being excluded, according to the previous proposition, from the operation of martial law even in time of war. And his meaning clearly is that those listed in the army cannot,

under martial law, lose life, member, or liberty in time of peace when the king's courts are open to all persons. Such, according to him, was the meaning of the Petition of Right. The substance, therefore, of what Hale says, is simply this—and it is in full accordance with the views we have already stated—martial law is a mere system for the government and discipline of the army in time of war; it is not applicable to those who are not of the army even in time of war, and it is not applicable to those of the army in time of peace. There is no reference or allusion to any other kind of martial law which, under any circumstances, can be made to supersede the common law by royal proclamation or any other means.

The conclusions we have drawn after giving every fair and reasonable consideration to all that has been said on the subject we are now discussing, are perfectly clear and distinct. Martial law was “indulged” to use Hale’s expression, for the government of the army during war, but was recognised in no other sense by the law of England, and has been superseded by military law, since the discipline of the army was provided for by the Mutiny Acts. The Crown, in its constitutional capacity, has no power to proclaim martial law as applicable to the inhabitants of the country at large, or of any district thereof, under any circumstances or conditions whatsoever. In the case of a riot, the magistrates are authorized, under the provisions of the Riot Act, to call in the aid of the military for suppressing such riot. When a rebellion takes place, the Crown is bound to put it down by military force, but all prisoners who are taken are to be tried before the ordinary tribunals. If the rebellion is of a very formidable character, and there is general disorder in the district where it occurs, Parliament may pass a law authorizing a summary mode of procedure against all persons who have been engaged in the outbreak, or have by their conduct contributed thereto. A more general state of disorder in which all the institutions and laws of the country are overturned or suspended is from the nature of the case beyond the sphere of law and legislation. It is the duty, in

such circumstances, of the Crown or of those who have the power to restore order by whatever means appear most suitable, although even then the exercise of greater severity than the necessity of the case required would not be justifiable. It is absurd to lay down any law which can be applicable in such circumstances, but there are principles of justice and humanity which even in such a state of matters cannot be discarded; and those who, being called on to meet so trying an emergency, act in a manner which the necessity of the case will justify, may well appeal to something higher and stronger than any positive law. What Cicero in the *Oratio pro Milone* has said with respect to the right of self-defence may be applied to such a state of things.

“Est enim hæc, iudices, non scripta, sed nata lex; quam non didicimus, accepimus, legimus, verum ex naturâ ipsâ arripimus, hausimus, expressimus; ad quam non docti, sed facti; non instituti, sed imbuti sumus; ut si vita nostra in aliquas insidias, si in vim, si in tela aut latronum, aut inimicorum incidisset, omnis honesta ratio esset expediendæ salutis.”

With respect to the recommendation of the grand jury at the Central Criminal Court, that martial law should be defined by the legislature, we must be allowed, notwithstanding the expression of opinion to the same effect by the Chief Justice, to question the wisdom and expediency of such a course. If the views we have stated be correct, there is no such thing as martial law in the sense in which it is commonly used, and the Crown has no authority to suspend the ordinary law of the country and to substitute for it martial law or any other kind of law. An enactment, therefore, in so far as this part of the matter is concerned, would be a simple declaratory statement to the above effect. To this there might be no very serious objection, but it would be of comparatively small advantage, and had better, therefore, we think, not be undertaken by the legislature. If an attempt were made to provide for extreme circumstances which are conceivable, such a provision would either be useless, or embarrassing, or liable to abuse. It is

better, beyond all question, that those in authority who have to act under such circumstances should feel that they are entirely removed from under the shield of any special law, that they are thrown upon their own responsibility, and that whatever they do for the public safety under the last necessity must be capable of being justified on moral and prudential grounds alone. No definition of such circumstances is possible, because these must vary in each particular case; and not only must existing circumstances be looked to, but contingencies also, of greater or less probability, must be taken into account, which may still more greatly vary. In such a state of things, the question will be, as Burke says of revolutions—"An extraordinary question of state and wholly out of the law; a question (like all other questions of state) of dispositions, and of means, and of probable consequences, rather than of rights;" and here too, as in revolutions, "the nature of the disease is to indicate the remedy."

With regard to dealing with rebels in the field, no definition of circumstances is necessary in ordinary cases, and where it might be desirable, it is not possible. The preservation of public order is a right paramount to every other right, but although admitted legally to exist, the mode in which it is to be exercised by those in authority, cannot be precisely laid down by legislation. In any case that may arise, calling for the vigorous exercise of the executive power of the state, the course of duty will be clear, if there be only good sense, right feeling, and proper decision on the part of the authorities; and if these do not exist, no rules which the legislature may lay down can supply their place. On the whole we think that it is not desirable that there should be any legislation in the direction indicated by the grand jury. What the duty of the Home Government may be in this matter with respect to colonial governments is a different question; but this is a subject beyond the scope which we have assigned to our observations on the present occasion.

## ART. III.—PARLIAMENTARY REFORM.

*Constitutionalism of the Future ; or, Parliament the Mirror of the Nation.* By JAMES LORIMER, Regius Professor of Public Law in the University of Edinburgh. 2nd Edition. London : Longmans, Green, Reader, & Dyer. 1867.

*Plea of the Unrepresented Commons for Restitution of the Franchise.* By THOMAS CHISHOLM ANSTEY, Esq. London : Ridgway. 1866.

*Our Constitution and the Elective Franchise.* London : P. S. King. 1866.

*The Middle Classes and the Borough Franchise.* By HENRY WARWICK COLE, Q.C. London : Longmans, Green, Reader, & Dyer. 1866.

*Speech delivered at a Meeting of the Liverpool Reform League, on December 19th, 1866.* London : Longmans, Green, Reader, & Dyer.

*A Safe and Constitutional Plan of Parliamentary Reform.* By SIR JOHN E. EARDLEY WILMOT, Bart., Recorder of Warwick. London : Ridgway. 1865.

THE following remarks upon the subject of Parliamentary Reform will probably appear to be somewhat out of date to those who regard the whole question as practically settled. To the great and increasing number, however, who are of a different opinion, any attempt to endeavour to reduce to a principle the spirit that ought to actuate any future measure upon the subject cannot be unwelcome ; and it is in this belief that we think it right to make some general remarks, not upon any actual Reform Bill that has been laid before the House, but upon the different views and ideas that have actuated the so-called parties during the struggle, without entering into any details that can possibly be avoided.

In a former number of the *Law Magazine* we promised to review at length the subject of certain pamphlets and articles

(of which some two or three only were named out of a great multitude) that had appeared in the course of several preceding months upon the long vexed question of Parliamentary Reform. At that time the whole matter was in the most different position from that in which it stands now that can possibly be conceived. The effect of the last six months has been to change a great party question, almost after the old fashion of party questions, into one which has in fact no dependence upon party, in any popular sense of the word, at all ; to settle, in effect, the great disturbing element, which, though it long slumbered, underlaid the whole territory of politics ever since 1832, and, practically, to make all fear of its inevitably rising to the surface a thing of the past. We now see our way to an end : an end, not indeed, universally satisfactory in theory—far from it ; but an end that can be foreseen and foretold with something like certainty. Instead of what *ought* to be, the real question now, in the matter of the representation of the nation in Parliament, is what *must* be. Thus there can be no great division of men into two great parties upon the matter any longer. To constitute a party there must be something more than a mere difference of opinion, even though that difference may amount even to the extreme of opposition, as to the desirability of any state of things ; there must be some principle of action as well as of mere theory, some belief in the power of men to bring about or prevent the state of things in question, and some reason to think that what is dreaded is not inevitable. Six months ago the country was divided into such parties on the question of Reform. Nothing was considered inevitable ; not even the passing of a Reform Bill at all within the lifetime of most of us ; not even any very large addition to the franchise ; certainly not any very sweeping change. There seemed even then to exist the three great parties called,—absurdly enough, but perhaps conveniently—conservative, liberal, and radical. There were prophets in those days both of good and of evil. But now there are not many who do not see, however unwillingly, the point to which England is rapidly and surely tending ; there

are no parties except so far as this point is regarded with fear or with desire; and the prophets have, without exception—unless Mr. Disraeli has throughout been gifted with the impossible length of vision which some of his present admirers claim for him—found themselves wrong; except, indeed, the prophets of evil, who always will be able to prove in words that they find themselves right. It would have been absurd, in the midst of the uncertain and barely intelligible history of the Reform question, to have attempted to criticise the effect of a hundred uncertain possibilities; now, it is comparatively easy; and it will be well to take advantage of the present lull to consider the point at which it will have to be taken up and where it will eventually land us.

On one thing, all who wish to consider the condition of the Reform question broadly are to be congratulated. An enormous amount of mere rubbish that encumbered it in the form of detail of the most trifling character, has now been swept away, and there even seems a hope—a strange hope when the talk is of the Reform of the franchise—that we shall get rid of battles about distinctions that are merely arbitrary and not founded upon any expedient principle whatever. Mr. Disraeli's celebrated resolutions had at all events this good effect, that they showed men how broad, how simple, how obvious was the real subject matter of the great political war. Perhaps this was one reason why they met with such angry criticism at the time. No doubt they were truisms, they were vague, and had little practical significance; but nothing makes men so angry as to be shown—which was the fact—that they themselves had been fighting desperately for truisms and for vague and useless points. At any rate the truisms that are over large are better than those which are over narrow. A better and more united tone began to make itself felt immediately after the speech in which those resolutions were laid before the House; and, though few might be willing to own it, it is not absurd to suppose that the almost universal laughter with which that speech and those resolutions were received was, though no

doubt unconsciously, directed by the laughers against themselves as well as against the Chancellor of the Exchequer, and had the effect of clearing the air, overloaded as it was by much of what deserved laughter, but which had never received its deserts. The resolutions were the scape-goat of the then position of the whole question of Reform.

It is far from the purpose of this article to give a history of what is fresh in the minds of all. The history of the details of the debates, in which detail after detail has been discussed *ad nauseam*, would be a more ungrateful and wearisome task than could possibly be expected at the hands of the greatest of enthusiasts for the little points in politics and in political statistics. With one word of admiration for the skill and the speed with which the Chancellor of the Exchequer has hitherto removed all obstacles to the attainment of the result which we believe he sees, and we believe sees rightly, to be inevitable, we will proceed to the more interesting and more useful labour of attempting to consider the question of Parliamentary Reform in the widest manner which it will at present bear; and, if the manner be thought somewhat over large or impractical, will hope that it may possibly, to some extent, as we have said of Mr. Disraeli's resolutions, aid in keeping the air clear from that cloud of small points that is apt to collect and become magnified until it is apt to crowd and fill the mind to the exclusion of anything like the possibility of a view that is even moderately wide. In writing on English politics, to err in width and in over-theorising is to err on the right side. The fault runs no risk of not being sufficiently, and even more than sufficiently, counterbalanced.

We imagine that we are safe in saying that, the great object of all reformers—that is to say of all politicians of the present day—is to obtain such a House of Commons as will best represent the whole of the nation and its classes. It is probable, also, that so far as is consistent with the perfection of representation we ought to endeavour to secure such a House of Commons as will be able to pass good measures and to govern



well. Were it not that all men dwell principally upon the first point, we should have preferred to place the second as the principal object: but to concede so much is no injury to our general argument.

To begin, then, with the first object. It would seem at first as though to secure perfect representation of the nation at large and of all classes of the nation the course would be to give every man a vote who was capable of exercising it. But against the theory of universal suffrage—which, however, is generally supported upon grounds less sound, as we shall presently show—comes the obvious answer that a nation is not perfectly or even fairly represented unless the representation is made proportionate to at least, if to nothing more, the number and influence of the classes of inhabitants of that nation. This is the principle of all parties save that which upholds universal suffrage. All other parties, while they differ only in degree and in detail, differ from the latter in principle and in kind. The lowest class is the largest—ought it *therefore* to have the largest share in legislating for the nation?—the highest is the smallest—ought it *therefore* to have the least? It is this question that lies at the bottom of the formation of every popular legislative body, from the time of Servius Tullius to that of the English House of Commons, and which forms the whole difficulty of their formation.

The *beau idéal* of a legislative assembly is an aristocracy of intellect, education, and social influence, united to its having as full a representative character as the circumstances of the nation to be governed will admit. But in developing this idea the great mistake amongst most theoretical politicians of the present day is to lay too much stress upon the difference of class and class. They seem to start from the false axiom that, in order that all classes may be fully represented, it is absolutely essential that all classes alike should furnish a proportionate number of representatives. The same mistake is continually made in speaking of the representation of universities, of towns, and of counties. Now, the fact is that, though England

is still more than any country in Europe divided into classes having different interests, it by no means follows that each member of a legislative assembly should, *eo nomine* individually be the special representative of any class or of any place. Very often, it is true, the interests of a class or of a place may vary from, or come into collision with, those of some other class or place, or with those of the nation at large, but it cannot be said, taking the British House of Commons even as it is constituted at present, that such place or class, were it without a special representative, as is the case with many at this present time, could be in the least degree in want of a voice to support its interests, if those interests were to any extent sufficiently large to be regarded at all. The nation is divided, it is true, but it is still one nation : the interests of the whole are identical with the best interests of all its several component parts, and it might not unreasonably be urged that each is best represented when all are best represented. But were it not so, and granting that it is not so, let us consider for an instant the interests of the artisans, *quâ* artisans, or the poor, *quâ* the poor. It cannot be denied that it is among the representatives of the richer classes that the artisans and the poor have found their best friends and advocates. Had artisans themselves, or members of the House of Commons directly and solely elected by artisans, have laboured more earnestly and zealously for them than have certain members of that house who have been their representatives, because they were part of the English people ? This cannot be otherwise. Whether from good or from bad motives, there must always be men enough to support almost any cause—we were nearly going to say, however weak or absurd—that is capable of being advocated by any voice at all. In many ways it is better for the general good that a special class should not be directly represented either by one of its own body or by any person sent to the House of Commons on the understanding, direct or implied, that he is to support other interests of that class on every occasion and under all circumstances, without reference to the general welfare. The object

should be not thus to divide class from class more than they are at present divided—and they are no doubt divided one from another more than sufficiently—by making the House of Commons a professed battle-ground between them, but to endeavour to unite them and to make them see that their truest interests are after all the same, by letting each member of the House know that he is placed in that position to watch and balance the interests of all. Special classes will always be able to secure a member of their own at a dozen particular places: the counties will always be able to secure to land its special representatives, the great seaports to trade, the great manufacturing towns to manufacture. This is inevitable, and is sufficient. If we attempt to do more it would be more than sufficient. It would have the best result were we to give up all consideration of class legislation, for we have it already to as large an extent as the interests of the whole body can well bear.

This removes at once a great and otherwise most difficult subject of consideration with regard to the means of electing a House of Commons that may be constituted in the best possible manner. It remains, then, the not difficult task to determine the manner in which we can best obtain intellect, education, and social influence. It is obvious that supposing the nation were to be divided into the two great classes of the rich and poor—there is no need to draw an exact line—these qualifications would be found, generally speaking, in the former and not in the latter. Exceptions count for little. Of course it must be understood that by the “rich class” is not intended merely those who have large fortunes only—many a man poor in purse belongs by association, way of living, and education to the same class as the man of the largest fortune in the world—nor do we commit ourselves to saying that there is no rich man who is not by association and education attached to the same class as the poorest labourer. But intellect, education, capacity for doing the work of the nation are, as a matter of course, to be sought for generally among the men who

belong to the professions, who are, as a class, educated at the universities, who belong to good families, or who occupy a leading position in trade, and not among the small tradesmen, the clerks, the artisans, or the labourers. We should have avoided stating what seems to us to be so obvious a truism were it not that it is practically so often disputed. Intellect, education, and capacity, stupidity, ignorance, and incapacity are of course to be found everywhere, among rich and poor alike. But the question is not where are they and where are they not, but where are we most likely to find them easily?

But here enters something of the inevitable. In any case money will have its way. The tendency of every civilised country is towards pure plutocracy, and of England more than of any other, partly from its commercial character, partly from the large private and public masses of money that exist in it. It has not always been so, but as classes have become more mixed than they were, as trade has gained a strong footing upon land, no one can help seeing that the aristocracy itself—to use the word in its vulgar meaning—depends more for its influence upon the wealth that it still possesses than upon its *prestige* or upon any remains of sentiment, however strong the effect of the latter still may be. This must be so, and, as money is the best test of what is the best governing class, it is best so. Not only is the possession of wealth by a class a good working guarantee for its possession, as a whole, of the requisites of a good governing class, but the attainment of wealth by a man who starts from poverty is a really good guarantee of his possession of a great many of the qualities that fit a man for belonging to the governing class. However much, therefore, any may, from sentimental reasons, object to the fact that money is more and more becoming the only source of power and be unwilling to admit it, the fact is one that it is impossible to deny, and equally impossible, on good political grounds, to regret.

It comes to this, that if we desire the Constitution of England to remain in keeping with the circumstance and tendency

of the time, this fact must be recognised and allowed to lead to its full consequences.

One consequence of the fact is that under no new system, whatever it might be, would the composition of the House of Commons be materially altered. It now consists—it would not be wrong to say entirely—of members who belong to the class of the rich, using the phrase in the sense mentioned above. If the franchise were a little extended no difference at all would probably be made: if it were much extended, or thrown open universally, none that would be perceptible. Certain of those who are members now would not be members then, and some few who now could not be elected by any constituency in the country, would probably obtain seats. But this slight change would be a change of a few individuals merely, and not of the class to which the whole House, as a whole, would still belong. Does any one believe that men without wealth, and without the leisure and means to attend to their Parliamentary duties, would have any more chance than they have now of obtaining that most expensive and troublesome of positions, a seat in the House of Commons? Without introducing a system of paying members for their services, such a state of things would as a rule be no more possible than it is now, that men should be willing in any perceptible number to give up their livelihood, or that, if they were, they would, in any perceptible number, obtain their desire. Universal suffrage, if it must come at last, need not make us apprehensive of our falling under the dominion of any class that, as a body, is uneducated and without the means and capacity of exercising its functions.

This is what Mr. Disraeli may, we imagine, claim the credit of having seen throughout. The supporters of a great extension of the franchise—many of them at least—are or have been probably influenced by some idea that a strongly democratic element will be imported into the House of Commons. Its opponents, on the other hand, have no doubt been strongly influenced by an apprehension of the same result. Both the hope and the apprehension we believe to be equally groundless.

The question of Parliamentary Reform is not merely a historical question of constitutional law, although we ought never to forget the history of the Constitution in dealing with any matter of legislation; nor is it one merely of political philosophy, nor one entirely of expediency, nor one entirely of justice. This remark would be unnecessary were not almost every theory that has been put forward on the subject, been founded on one or other of these grounds only. The question is really one of an exceedingly mixed and complicated kind; it is, no doubt, when looked upon from a very necessary point of view, one of a very abstract nature. While this may be said to a greater or less extent of all political questions, it is especially true of large subjects like that of Parliamentary representation, which directly depend upon first principles. To this extent, they are as much within the province of the mere student of political philosophy as that of the practical statesmen. When, however, principles have to be put into practice, the case is very different. The world was never yet entirely governed by logic or philosophy, and one may very safely prophesy that it never will be so ruled. We are, accordingly, not much disposed to attach much importance to the multitude of schemes that have been put forward on all sides for setting right our system of Parliamentary representation, and we are not the more disposed to accept them when we see the ease with which all difficulties vanish before them. We do not, in making these remarks, intend to pass any censure upon the framers of even the most purely abstract systems of Parliamentary reform—far less upon the authors of the pamphlets mentioned at the head of this article, which are all, though different in aim and coming to widely different conclusions, written with ability and sense, and are well worthy of notice. With the tone of the letter of Sir Eardley Wilmot, in particular, we most cordially agree; it is moderate and liberal in the best sense of the word, and the result at which it arrives is practical and deprecatory of violent and sudden change. But this does not alter the fact that almost all schemes that have been put forward look too

well on paper. They are too perfect to be good, and seemed based upon the idea that a legislative measure which is logically invulnerable, is necessarily good—that, in fact, government upon sound logical principles is the only object of all legislation. Now this is a very great error—besides being good in itself, a legislative measure ought to satisfy as many as possible of those for whose benefit it is passed. However sufficient, therefore, the present state of Parliamentary representation might be, it must be found wanting, because very few are, and fewer still profess themselves to be, satisfied with it. We doubt if one candidate at the last general election expressed himself as thinking otherwise than that some kind of change is necessary and inevitable. Because Reform was almost universally thought necessary, it became necessary—not, however, Reform of a general and random character, but special, and confined to the points as to which the general dissatisfaction existed. Not that we want a Reform Bill that need seem absolutely good in itself to any—for that would imply the satisfaction of one class at the expense of the rest—what is wanted is a measure that will give such redress to the grievances of all as is not directly opposed to the interests of general good government. That a measure should actually be a little wrong in principle or in detail, is far better than that the majority should think it so: good and stable measures must be built on compromises, however illogical and unphilosophical compromises necessarily are.

The subject of Reform in reference to prevailing grievances naturally divides itself into three questions:—who ought to possess the franchise? how ought elections to be carried on so as to render them less corrupt? and how ought seats in Parliament to be distributed so as to equalize representation as much as possible? All these are of too wide a nature to be discussed, however briefly, within the limits of a short article, and we shall, therefore, at present, confine ourselves to the first and most prominent—who ought to have the right of voting at the election of the House of Commons?

In offering then a few suggestions upon this subject, we do not intend so much to put forward any new theory as to review very shortly the most prominent of those that are held by others on the vexed question of Parliamentary Reform. These theories, while of infinite number and variety, from the extremest conservatism to the extreme of what is now called liberalism—we fear that we must make use of these much abused terms—form to so great an extent a series of such fine gradations, and are so often divided from one another by such almost imperceptible distinctions—sometimes real, but often only verbal—that to range in two opposing camps two opposing political armies, such as dispute between them almost every other political question, appears at first sight almost impossible. Unfortunately, the whole subject has, in fact, been to a very great extent confused by causes which, though common enough, have hardly ever obscured the real issues contained in any controversy to so great a degree as they have obscured those contained in this. Class prejudices unfortunately are only too apt to come into collision upon small provocation : but seldom have class prejudices been so strong as now : almost within the memory of man, seldom has any question been productive of a greater amount of bigotry and ill-feeling, always active and not always impotent. However much we may rejoice to see that the English interest in all that belongs to national politics is certainly not less active now than it has always been, we cannot but regret, however uselessly, the necessity that a question which more than any other ought to be treated largely and calmly, which ought to interest all, not as partisans, but as members of one commonwealth, must be confused by such causes as these. Of course, although good practice can only be the result of good theory, and although abstract theory has its place in politics just as it has everywhere else, still it is useless and absurd to treat politics exactly after the manner of an abstract question in philosophy ; but there is so much zeal and so much partisanship brought to bear upon this particular subject, that there is little fear of introducing into it too much



of the calmness of abstract reasoning. There are probably none, not even the most conservative, who would look forward with any very great amount of satisfaction to a very long continuance of the recent state of things with all its discontent, its hostility between class and class, and, what is almost worst, its corruption. The palliation or increase of these evils depend very much upon the kind of measure that is finally adopted, and have certainly required all the attention that was given to the matter during the last session. We cannot, therefore, complain of the number of theoretical remedies, however large: for they are, at all events, useful to show the different views of the different parties and classes with whom any satisfactory Reform Bill will have to deal. It is interesting to compare one view with another, to see how and why they differ, to follow out the entanglement of the whole question of Reform, and to attempt to discover that its disentangling is not impossible, although not easy. This can be best undertaken, not so much by criticising the speeches and opinions of particular statesmen and politicians, as by examining the opinions of the nation at large, collectively and in its various classes, and, what are of as much importance as its opinions in a subject of this kind, its feelings and its tendencies. We do not hesitate to say that this is of more importance towards forming a satisfactory Reform Bill, than if we content ourselves with proceeding even upon the soundest theoretical principles of political science, and leave out of sight the most important principle that sometimes even a bad theory that gives men what they want and satisfies their reasonable desires is better than one that is sound enough to satisfy a nation of logicians and philosophers, which England most certainly is not. It is the part of the political philosopher to discover what the opinions of men ought to be: but it is that of the practical statesman rather to know what they are: to accept them, and make the best of them. What men think, is of more importance when we deal with the question of Reform, than what they ought to think. To find, however, what men actually think,

is no easy task. We have mentioned the fact that almost every other great question that has agitated the world of politics has been debated between two distinct parties, whereas the question of Reform gives rise to almost as many parties as there are persons interested in it. It is a great mistake to class all people as either reformers or anti-reformers. We very much doubt the existence of the latter, and a particular party, or rather section, is somewhat too anxious to confine the former title to itself. It is unfortunate that the extension or non-extension of the suffrage has become so prominent above other Reform topics and surpasses them so much in immediate interest that it has become almost identified with the idea of Reform, to the exclusion of the rest; and men often forget the fact, that almost, if not quite, all who take an interest in Parliamentary representation are reformers in some form or other, and their differences are of extent, of direction, or of degree, or of some or all of these. The fact, however, that the word "Reformers" has gradually become attached to those who desire Reform in a particular degree, in a particular direction, and to a particular extent, has made the word offensive to many of those who are really desirous of the thing itself. Reform may, in effect, be as essentially conservative in its character as it may be essentially liberal, using the word "liberal" in its popular sense as the reverse of conservative. As we said before, from the extreme conservative to the extreme liberal, there is an unbroken series of opinions, each being so imperceptibly distinguished from the next to it on each side that it is often impossible to say where one ends and the next begins. The extremes are far enough apart, it is true; but to say where we are to draw the line between them is a question of the nicest difficulty.

There are, however, two grounds which, though somewhat too abstract to be much alluded to in actual controversy, really underlie almost all the views entertained upon the subject of Reform. Perhaps, if we must divide those who entertain views upon the subject into Liberals and Conservatives we may, with

the greatest amount of meaning, and with least inaccuracy, apply the former name to all those who consider the exercise of the franchise a *right*, and the latter term to all those who consider it as a *privilege*. One class maintains that it is a right inherent in every man, which either ought or ought not to be modified or controlled in order to render its exercise beneficial: the other class maintains that no man has a right to the franchise unless he can shew that he is qualified to exercise it: that the government of a nation ought to be carried on only by those who are properly qualified to do so for the benefit of themselves, and of those who are not so qualified. The opinion may be modified or not according to what is meant by properly qualified persons. Some may consider them to be necessarily in the minority: others, not so. It is easy to perceive how closely the two parties may approach each other practically: how little difference there apparently is between those who believe that it is expedient to check closely the exercise of an individual right for the purposes of good government, but who still presume in favor of its exercise, and those who, not considering the exercise of the franchise to be a right at all, nevertheless consider that a very large majority of persons are qualified to possess it. But, closely as the two opinions may approach, the essential difference between them cannot cease to exist, and ought never to be lost sight of. It lies at the root of all differences of opinion as to this branch of the subject of Parliamentary Reform, and affects all the theories that have been advanced concerning it.

Let us, then, proceed to examine in its extreme form the theory that the exercise of the franchise is a right inherent in every person subject to government, of which no man ought to be, or, indeed, can be, deprived. It is unnecessary here to allude to the question of the extension of the suffrage to women, as whatever its character may become hereafter, it is certainly at present of no practical importance: and, though we are criticising the opinions that are held upon the whole matter from a somewhat abstract and theoretical point of view,

we must pay attention to the limits of actual argument. No opinions in England are ever pushed to their extreme limit, and it would even be unfair to speak of the opinion that the franchise ought to be possessed by every adult male of sane mind and otherwise free from glaring incapacity as illogical because many of the arguments upon which it is founded would tend equally to admit women, children, malefactors and the insane. Hence, though we are far from saying that we go with Mr. Gladstone's "flesh and blood" doctrine, still we think that it has met with an excess of ridicule from many who should be the last to take sweeping assertions in a literal sense. Such assertions are always, in any controversy about practical matters, to be taken only as far as any reasonable man can intend them to go. According to this view, there is nothing monstrous or illogical in the theory of universal suffrage in the limited sense in which its extremest supporters understand it, simply because their arguments, pushed to an unreasonable length, force upon us an unreasonable conclusion. What is meant is that every man, who is not manifestly incapacitated, socially or naturally, from exercising the right of franchise, is entitled and ought to be permitted to exercise it.

But can it be absolutely said, even in the limited sense, that we have attached to the theory of universal suffrage, that every individual citizen has a right to share in that government of the nation of which he is a member? This question has first an abstract side, to which we have already alluded, and of which we shall speak more fully presently: and, secondly, it is supported and attacked on the grounds of practical expediency. Some deny the title altogether—others, admitting the title, argue that it ought, like every other right, to be made to yield to the higher object of good government. If, say the latter, admitting that the theory of universal suffrage is not to be forced to a manifestly absurd point, still, for the sake of order, of proportionate representation, of the choice of the best representatives, of uncorrupt elections, of a hundred other important points, where are we to draw the line? You

assert that a child, a madman, or a criminal, must necessarily be excluded, and, when we ask why, you answer, because he is manifestly incapable of exercising his rights in a proper and reasonable manner. Let this be granted, and it necessarily follows that you consider manifest incapacity for exercising the right of franchise in a proper manner as a good and sufficient reason for not permitting its exercise. On this ground we maintain that you ought equally to exclude the very poor,—some may say—who are manifestly corruptible :—or the very ignorant,—others may say,—who are manifestly unable to choose the best representatives : or the working classes, because they would manifestly have an excessive proportion of general representation—or those who pay no taxes, because they manifestly have no interest in the proper control of expenditure. We admit your principle, but differ from you as to the extent to which it ought to be modified.

It is from controversies like these that have principally sprung the hot disputes as to the character of “the working classes”—to use another much abused phrase :—the extreme supporters of manhood suffrage and certain sections of the liberal party asserting, and other sections of the same party uniting with the conservatives in denying, that they as a body, or else some classes of them, labour at present under a manifest incapacity, from causes variously alleged, for exercising the franchise in a manner proper in itself and conducive to general good government. We can imagine, indeed, that some holding conservative opinions might be more willing to admit wholly or partially, what are called the working classes to the franchise, than some holding liberal opinions. It would be quite consistent for a man to consider that the franchise was a privilege of the qualified, and that the working classes wholly or partially, being qualified, were entitled to it ; and it would be equally consistent for another to consider a right to be modified in cases of incapacity to use it, and that the working classes being, to a greater or less extent, so incapacitated, ought not to be permitted to do so. This all the more shows how difficult it is,

even though a real difference may exist, to distinguish properly and clearly between the opinions held by different parties and to classify them.

It is probable that, logically, no man whatever can properly be said to have an inherent and inalienable right to the exercise of the franchise. At the same time it ought to be stated that there is probably only a verbal difference between those who hold this view and those who maintain the contrary; while, we think, there is often a real difference between such persons and those who verbally agree with them. No one who has the slightest idea of using words accurately, has not been struck by the exceedingly vague, and indeed, unintelligible way in which the word "right" has been used. We will not here enter into a discussion upon the proper use of the word; it is only necessary to remember that whenever it is said of any class that its members "have a right to the franchise," the phrase invariably signifies only either that "it is just that they should have the franchise"—or else "it is expedient that they should have the franchise." This is plain and obvious enough; but it would be endless to give even a short list of the fallacies that have been produced from its having been so very often, we will not say not understood, but forgotten.

We are thus able to divide the class who speak of the right to the franchise into two great subordinate classes; those who mean that it is just that all or some should have the franchise, and those who mean that it is expedient that all or some should have the franchise. The latter class may also be considered to include those who deny the right: for they allow that it is expedient that some—that is to say, those who are properly qualified to use it—should possess it. It would, indeed, be a most excellent thing, and would simplify matters exceedingly, if the unfortunate word "right" had never been imported into the controversy at all. It throws a metaphysical cloud over a practical matter. Most men, however, and certainly most Englishmen, have a very good idea,—good enough at all events for practical purposes, of what is just and what is

unjust, and all can argue, more or less intelligibly, as to what is expedient and what is inexpedient; but inherent and inalienable rights—has one person in a thousand who talks of them, the least idea of what they mean?

We have dwelt long upon what may be thought a mere verbal quibble. We should not have done so had we not found the abuse of the word "right" at the bottom of half the fallacies and word-battles that have sprung up during the Reform controversy, and we should only be too glad to think our notice of it had been unnecessarily long.

It is best, from these considerations and for practical purposes, to consider those who hold opinions on Reform questions to be divided into the two classes of those who consider that the franchise should be given to all who are capable of exercising it, and of those who consider that it should be given to those only who can be shown to be qualified to use it well and properly. From the first springs the theory of manhood suffrage; from the second, the numberless sub-divisions consisting of those who consider that the presumption is in favour of, and of those who consider that the presumption is against, the existence of such qualification in each particular instance.

We may take for granted that any future Reform Bill that has any chance whatever of becoming law must be based upon the exclusion of all classes which may be assumed to be unqualified for the franchise. The difficulty is, what classes are to be assumed qualified, and what disqualified, for exercising the franchise in a proper manner?

In order that this question may be answered, some test must be taken by which some classes are to be admitted to the franchise and some excluded. The tests that are proposed, and which, by their respective proposal, characterize the party adopting them, seem to be two—those founded in some sort upon wealth or property, and those founded upon education. It is difficult at present to suppose the case of a Reform Bill which would include those who possess no property; and the educational test is put forward so prominently by so many that it must of necessity be considered.

Upon the distinctions and tests that we have now enumerated are founded the several main parties with which any Reform Bill must deal, which have all a claim to be heard, and, we think, satisfied as far as practicable. A Reform Bill, to be sound, must be generally satisfactory, and to be generally satisfactory it must be founded more or less on compromise. This may be said, in fact, of all good legislation. Unfortunately, whatever may be urged in favour of manhood suffrage—and there is a great deal that can be urged in its favour—the simple impossibility of its being adopted until parties in general stand upon a very different footing than they do at present must cause even the best Bill that can now be introduced to be unsatisfactory to a very great number indeed. The legislative class is still, perhaps to its shame, very ignorant of the qualifications and capacities of the working classes for government: those of the working classes who have enjoyed the franchise most certainly, and equally to their shame, gave during the last general election but too great reason for thinking that they are but too liable to be influenced by corrupt motives. Whether this is true of the whole body we will not be so unfair or so unjust as to affirm—for ourselves we believe not; but we must remember, in matters of Reform, that we can never stir a step backward. We ought to make no experiments, but proceed safely and securely. Before we can venture safely upon manhood suffrage, or in fact, anything approaching to it, we must know well the men to whom we are to give it; and we do not know them. But the very fact that we do not know them should teach us that a good Reform Bill ought to be elastic, though not experimental. We ought to remember that though there are classes whom we cannot admit to the franchise at present, they may even now be worthy of it, or, at least, may become so; so that we neither can nor ought to pass a Bill which should profess to put the question still further at rest for more than a very limited time. The occasion no doubt calls loudly enough for Reform; but most certainly not for a Reform that shall itself be unreformable; while, at



the same time, we should be careful now to admit those only whom we can now safely admit, and whom we know we ought to admit. Time will show us if we ought, as we hope we ought, to admit all. This view alone, which is surely sufficiently reasonable, should render the framers of an honest Reform Bill less disposed to yield to clamour, and, at the same time, make honest agitators less disposed to be clamorous; and should render a Bill, which stops even a long way short of manhood suffrage, less unsatisfactory to a very large party which it cannot at present satisfy. Perhaps we may be wrong in speaking so much of the supporters of manhood suffrage, who may be less numerous than we may seem to think; we speak, however, of manhood suffrage as the extreme and typical form of the tendency of a large class, many of which do not go so far, but would be equally dissatisfied under the same circumstances.

In short, we conceive that the next Reform Bill, while reasonably satisfying the property and education of the country, should, as little as possible, dissatisfy those who deny that the qualification for the franchise should be tested by property or by education. Now the first and most obvious point with regard to this is that as a rule, property and education go together. By taking property as a test, we, at the same time, ensure the greatest chance of obtaining the leaven of education and of giving to the educated classes their due amount of influence. In fact, this is so obvious that we may be sure that property will always be the main basis of any limited Reform Bill.

Besides, it is the duty of every well-considered legislative measure to be governed by the logic of facts, and not vainly to make facts square with any abstract notions of justice. Now, it is a most undeniable fact that, in all modern systems of society wealth and property, in some shape or other, will always have a predominant influence. The tendency of all modern forms of government is to approach more and more nearly and more and more rapidly to the condition of pure

plutocracies. In fact, we should not be very far wrong if we assert dogmatically that this always has been so in all places and all times, and must be so always and everywhere, and that it is a fact in political economy which must be accepted even if it be only to avoid absurdity. What, then, are the consequences that follow from it?

One is, that since wealth and property are by nature and of necessity predominant, we ought to check its becoming all-powerful. A pure plutocracy would be a great evil, and we cannot help seeing that if, on the one hand, there is danger in being over-ridden by the uneducated many, there is at least a danger, on the other hand, of being altogether governed by the wealthy few, those few becoming more and more one class in proportion as landowners are more and more recruited from the commercial and manufacturing bodies. It is true that education and wealth, as a rule, are more likely to be united than education and poverty; but there is most certainly a large class equal to the upper classes in point of education and intelligence, though entirely devoid of that amount of wealth that can give them any influence whatever, although they deserve it equally and are manifestly equally qualified to use it. It is from feeling this strongly that has principally led to the proposal of lodger-franchises, professional franchises, the conferring members upon the Inns of Court, increasing the number of University members, &c., and what, in general, are known by the name of fancy franchises. Whatever the value of these proposals may be, they do not affect the value of the principle upon which they depend: that while property must be taken as the basis of admission to the franchise, care must be taken that the basis must be made large enough to support all who are equal to or above the lowest standard—we mean that it is somewhat absurd to make the property test such that while it admits some who are well qualified, it excludes others who are equally or better qualified. At present, we have the anomaly—it may be expedient, but it is nevertheless no less an anomaly—of the franchise being possessed by a poor man who happens to

be a qualified householder, while one far his superior even in property—which is, and ought to be taken as the main test—is excluded, because he happens not to show his possession of property in a particular manner. This state of things, at all events, demands inquiry; it certainly appears to be opposed to the law of facts and of justice.

But it may be said that the property qualification is now sufficiently low to prevent any danger of plutocracy. We would here notice an argument which is not very often made use of, though it is a very strong one, and which is essentially liberal, though directed against a very great lowering of the property qualification—perhaps, that is the reason why it is seldom heard. It is this: that in order to guard against plutocracy and class-rule, we ought to fear not throwing the franchise into the hands of the comparatively rich, but into the hands of the poor. It may be argued in this way; the nearer we approach to universal, or manhood suffrage, the poorer and more uneducated the class that we shall admit to the franchise. Now, no one will deny for an instant that the poorer and more uneducated any persons individually or in classes are, the more subject are they to corrupt influences. We do not mean to cast a slur upon any class of persons, we only say that the poorer a person is, the less money it will take to buy him, and the more he will depend upon his employer. Now the classes at present excluded from the franchise would, when admitted, form a very large number indeed, all nearly of the same class, all employed by persons far richer than themselves—the richest merchants, manufacturers, and landowners in the country. Can anyone doubt for a moment the enormous amount of influence that would at once—even by lowering the limit of household suffrage a pound or two—be thrown into the hands of the merchants and landowners, but, above all, of the manufacturers, as the greatest employers of labour?

Sir Eardley Wilmot, in his pamphlet, draws the conclusion that it would be safe to descend to £8, but unsafe to descend to £6. With this we have nothing to do; but what certainly

strikes us is, that by reducing the standard even to £6, we let in an enormous number who would almost entirely go to strengthen the hands of the great employers of labour and, *a fortiori*, if the standard were reduced lower still. The most conscientious employer could not avoid, at all events indirectly and unconsciously, influencing his servant, the most independent servant cannot help being more or less influenced by his master, and the closer and better the relations existing between them, the more would this be the case. But many employers are not conscientious, and many servants are not independent. If the power of corruption and fear are great now, an immediate extension of the franchise would increase the direct means of the power of money a thousandfold. It is but little to answer that no money would suffice to buy so large a multitude; it can easily be answered that votes would become cheap in proportion. Besides, direct bribery is one of the least means of the influence of money. Any largely extended suffrage must be accompanied at present by the ballot, to give it even the least chance of success; and the time when the ballot stood the least chance of being adopted is either long past or has not yet arrived.

No doubt, to have adopted some specified and fixed line, below which the franchise should not be exercisable, would have saved an immensity of trouble. The fact is, however, that no such line exists, and not only so, but it would have been a very great misfortune if it had existed. The very merit of adopting property as the test of capacity for the franchise, is that the line is arbitrary, and can be arbitrarily altered. The usual objection taken by Dr. Lorimer reminds us of the old question, "How many hairs must there be to make a horse's tail?" Do one thousand? Do nine hundred and ninety-nine? and so on. But for practical purposes we know perfectly well what is a horse's tail. So it is with the franchise. We may not be able to tell at what particular pound of rental or taxation the line ought to be drawn; the great thing is to draw it somewhere *about* where it ought to be

drawn, and from which it may be removed without sacrifice of principle.

But though the suffrage ought not at present to be very much lowered, it should be made low enough to admit all who, by ordinary industry and activity, can force themselves into it out of the very lowest classes. The possession of a small degree of property in the working classes, implies a much greater degree of moral and political worth, than a considerable rise in life does in classes far more highly placed above them. The admission of the hard-working and intelligent artizan should always be rendered possible. We fear that there would not be too many. Mr. J. S. Mill is no doubt right in looking at the possession of the franchise as an excellent means of political education; and no doubt it is, or may be made, one of the highest means; but the political education of the people is not the only thing to be considered. The proper exercise of the franchise is not the alphabet of politics.

The danger arising from the too great influence of wealth, would, then, best be guarded against, by making the property qualification for the franchise sufficiently high to exclude the majority of the working classes, yet sufficiently low to include the best. This must be one great object of a sound Reform Bill, while at the same time, we fully admit, it will be one of its greatest difficulties. Not only is there the difficulty of deciding as to what the best limit is, but the limit ought strictly to differ in different places. To vary it according to all circumstances is manifestly impossible; we must be content with the expedient of an average as little unsatisfactory as may be. Another difficulty will consist in the fact that no average can be made that ought to be more than temporary.

Looked upon from another point of view, it is doubtful if an approach to manhood suffrage, or even manhood suffrage itself, is of the great importance that many attach to it. We have alluded to it, and found fault with it, as being too extreme a measure to adopt at once, as probably involving the consequence of introducing a very corrupt element into parliamentary elec-

tions, and as tending to strengthen the power of mere wealth, which must, in any case, be sufficiently strong. But its opponents object to it on other grounds. They say that an element would be introduced into the House of Commons itself, which it would be very inexpedient to introduce there, and that the voices of the uneducated majority would entirely swamp those of the educated minority. Both these fears are, we think, ill-founded. Wealth and education will have their way, and, as we have said before, none are so apt to be led by wealth as those who have it least. The voices of the working classes would be the voices of capitalists. This may seem to be a bold assertion in the face of Trades' Unions, but we must remember that we are speaking not of cases in which the interests of labour come in collision with the interests of capital, but of general elections, the expenses of which would be necessarily enormous, on account of enormous constituencies, and which could only be borne by men either with wealth themselves, or with wealth to back them. The working classes have a far better chance of having men to properly represent their interests in parliament at the present time, and under present circumstances, than if they had nominally a greater voice in elections. As to the idea that working men themselves could by any possibility be elected, unless we introduced the system of paid delegates, we cannot but repeat that it is no otherwise than exceedingly absurd. There can be no reason to suppose that candidates would come from any different class than that from which they come forward now; and they would probably come from a smaller and even wealthier class, and one less widely representing the nation at large.

There is another and most necessary part of Reform on which we have scarcely touched. We allude to the prevention of corrupt practices at elections. We only allude to it now, as lying at the root of half the difficulties under which the whole subject of Reform is overwhelmed. Could we believe that corrupt practices could be prevented—and by corrupt practices we do not mean bribery alone—we ought at once to throw

open the franchise, to every citizen of England who is capable of exercising a citizen's rights. It is in the hope that they may be prevented, or, at least, greatly mitigated, that encourages us to propose that a Reform Bill should be temporary, and should aim at the reception of the better portion of the working class. That portion is very large, we firmly believe; and through it, all may be leavened. But, until the time comes when we may safely admit all, it would be monstrous to run the risk of having to submit to the rule of the richest, based upon the corruption of the poorest.

What we wish to advocate, so far as it is our object in this article to advocate any measures, are liberal, but, above all, moderate measures. We do not think that the difficulties of good are worse than those of bad legislation, if improvements are carried on "without haste, but without rest." Whether the franchise at this moment is low enough for the purpose that we have described, we will not venture here to decide; but we are certain of this, that statesmen ought to be quite certain that it is not so before they attempt to lower it, and then they should only lower it little by little, making each step firm and secure before venturing on another. Nor will we venture to decide whether it is impossible or not to include within the franchise *all* who are equal or superior in position to the lowest class that is admitted to it; but we are certain that statesmen ought to be certain upon the point before they refuse to do so. We certainly believe, however, that Reform is still required; we have endeavoured to disentangle opinions that have to be consulted, the questions that ought to be considered, and if possible settled, with the principal difficulties surrounding them; and the only conclusion that we care to draw is that Reform should continually proceed, but with slow and moderate steps. If this is a truism, it is a truism that will well bear repeating.

To recapitulate, we have, proceeding from the point that a good Reform Act ought, above all things, to be as little unsatisfactory to all parties, noticed those points upon which all

parties lay the greatest stress. For the sake of those who advocate manhood suffrage, and, whether we agree with them or not, the good that follows practically from their principle ought not to be thrown aside because we may not agree with the principle itself; the Act should be of a nature that can readily be altered and adapted to changing circumstances. The lowest standard for entitling a man to the franchise ought to be at least low enough to allow it to be obtained by the best of that class which, not because we mistrust them individually, but because we think that their admission would be injurious alike to themselves and to the middle classes, as a class we exclude. This object would be obtained by making one standard depend upon rental. Again, for the sake of the educated classes, we ought to have some other standard than that of rental, as otherwise a very great number of them must necessarily be excluded. They would, as a rule, be admitted by setting up a standard depending upon income tax, or upon some more general system of rating. We are not inclined to make out that the difficulties of detail in framing a good Reform Bill are not exceedingly great, in the eyes of all who honestly wish for something more than class predominance; but there is surely no difficulty in the existence of the two tests of rental and rating. The idea of their necessary separation has taken root only because they have formed party phrases. We purposely avoid entering into any details as to what the lowest standards should be, that is not within the province of a short review. We only submit a basis of principle upon which, we doubt not, many good and practical schemes could be built without violently changing the present state of things, without putting out of sight accepted facts and social changes, without committing the nation to a final settlement of the question, and above all, without ignoring the opinions and wishes of any large class.

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#### ART. IV.—GENEALOGICAL BOOKS AS HELPS TO LAW.

IN the searches constantly required by the law as to family history and family descent, works on genealogy are of the same use to the legal investigator as those on geography are to the traveller. The information found in either case is not proof of itself, but it points the way to demonstration and correct solution. Geography, to be useful, must of necessity deal in the minutest details, and it has been truly observed that a geographical work cannot be too extensive. The same may be said of genealogical books. They are really of little practical use unless the fullest descents and the fullest particulars be given. In corroboration of this is the able and graceful volume we are about to refer to. That volume, considering the care and research expended upon it, would have been invaluable if it had been extended and the pedigrees and facts it touches on had been fully gone into and unravelled. The work alluded to is "*The Noble and Gentle Men of England, or notes touching the arms and descent of the ancient Knightly and Gentle houses of England, attempted by Evelyn Philip Shirley, Esq., M.A., F.S.A., late M.P. for the co. of Warwick.*" Mr. Shirley, himself by blood and standing, and in every way a gentleman—the great Squire, in fact, of Eatington and Lough Fea, writes with feeling as well as knowledge, and his labours are honestly and accurately accomplished; but he is historically and genealogically too concise, and his production too much resembles a mere catalogue to be of the value it should be. He includes, too, only the families which have preserved male succession, and excludes consequently the great mass of English houses, which are generally represented through heiresses; for instance, Lucy of Charlecote, Coke of Norfolk, Baskerville of Herefordshire, Fairfax of

Gilling Castle, Massingberd of Gunby, Robartes of Lanhydrock, and countless others. For lawyers, therefore, the book, except as an interesting curiosity, will be but of little avail. Some of Mr. Shirley's notes on legal worthies are, however, worth quoting. Of the Fortescues, Earls Fortescue, he says :—

“The great glory of this house is Sir John Fortescue, Lord Chief Justice of England in the reign of Henry VI., and the author of the work “*Of Absolute and Limited Monarchy*.”

In referring to the Tremaynes of Helligan in Cornwall, Mr. Shirley remarks,—

“The founder of the present family was Richard Tremayne, whose son purchased Helligan in the reign of Queen Elizabeth, and who is thus noticed by Carew in his survey of this country. ‘At the adjoining St. Ives, dwelleth master Richard Tremayne, descended from a younger brother of Colocome House in Devon, who, being learned in the laws, is yet to learne, or at least to practise, how he may make other profit thereby, than by hoarding up treasure of gratitude in the mindful breasts of poor and rich, on whom he *gratis* bestoweth the fruits of his pains and knowledge.’”

The great Shropshire family of Plowden of Plowden, he too briefly notices, thus—

“**FLOWDEN OF FLOWDEN.**”

“When the ancestors of this family were first seated at Plowden is a matter of doubt, but it was at a very early period. In 1194, Roger de Plowden is said to have been at the siege of Acre with Richard I., and there to have acquired the fleurs-de-lis in the arms. The name occurs upon all the county records, from the reign of Henry III. Edmund Plowden, the lawyer, in the sixteenth century, was the great luminary of this family. **ARMS**—*Azure, a fesse dancettée, the two upper points terminating in fleurs-de-lis or.* Present representative, William Henry Francis Plowden, Esquire.”

We are glad to find Mr. Shirley ranking among his

knightly families, one now represented by a learned Serjeant-at-law, viz—

“WOLRYCHE OF CROXLEY.

“This is a very ancient Shropshire family, descended from Sir Adam Wolryche, Knight, of Wenlock, living in the reign of Henry III., and who, previous to being knighted, was admitted of the Roll of Guild Merchants of the town of Shrewsbury in 1231, by the old Saxon name of ‘Adam Wulfric.’ His descendant Adam Wolryche was M.P. for Bridgnorth in 1435, being then of Dudmaston, where the elder branch of this family was seated for a considerable period, created Baronets in 1641, extinct in 1723.

“The present family descend from Edward, third son of Humphry Wolryche, Esq., grandson of Andrew Wolryche, which Humphry is recorded as one of the ‘Gentlemen’ of Shropshire, in the seventeenth of Henry VII., 1501. There were branches of the family, now extinct, at Cowling and Wickhambroke, Suffolk, and Alconbury, Huntingdonshire. *ARMS—Azure, a chevron between three swans argent.* Present Representative, Humphry William Wolryche, Serjeant-at-law.”

Of course it must be understood that we attach no blame to Mr. Shirley for not having rendered his well-written notes more useful for the purposes of legal research. Such, clearly, was not his object; but we only regret that his industry and accuracy did not incline to the reproduction of elaborate family history and elaborate family descent.

Other recent works provide for the want that Mr. Shirley’s mind was not directed to. At the head of these stands a most able periodical, entitled, “*The Herald and Genealogist*, edited by John Gough Nichols, F.S.A.” This journal, now in its fourth volume, far surpasses any publication of the kind that has preceded it, even the Gentleman’s Magazine in its palmy days. The “Herald and Genealogist” is peculiarly adapted for lawyers, for it goes most fully into every kind of family history and family descent, proving every pedigree given inch by inch. In one respect “The Herald and Genealogist” is doing a public service, and that is, in thoroughly sifting the

pedigree of doubtful Baronets. It is really a slur on the British constitution, that a title of such import and value as that of a baronet should be allowed to exist without some means provided to prevent its false assumption. There should be a tribunal to try and establish the right to a baronetcy. Yet, in the absence of such jurisdiction, Mr. Nichol's periodical does essential service. As an example, we may mention its learned article on the whole pedigree of the Temples, and on the claim of the present Sir Grenville Temple, of Stowe, to be a baronet at all. Were the case intended for the House of Lords, it could not be more eruditely or elaborately put; and, we must say, after such an exposition, it behoves Sir Grenville to at least apply to the Herald's College to have his pedigree satisfactorily settled. The "*Herald and Genealogist*" touches on most matters of genealogy that occupy, and oft absorb, passing legal attention. As an interesting instance of this, we give the following extracts from its article on the contested (and now by the House of Lords virtually settled) case of the earldom of Breadalbane:—

"This prize is not merely an Earldom, but one that is richly endowed with a rent-roll of £40,000 a year. On the 8th November, 1862, within the Beau Rivage Hotel, on the banks of the Lake of Geneva, there died, at the age of sixty-six, after a sudden and short illness, John Campbell, second Marquis of Breadalbane in the Peerage of the United Kingdom, and fifth Earl of Breadalbane in the Peerage of Scotland. The Marquisate had been conferred on his father the fourth Earl, in 1831, by Earl Grey's government, in consideration of his steady attachment to the Whig party, and not perhaps without some reference to the fact that Lord Kinnoull had been recently elevated to the Lord-Lieutenancy of Perthshire, by the immediately preceding Tory government. This dignity, which was conferred only upon direct male descendants, became, by his Lordship's death without issue, extinct; but the succession to the Scotch earldom, and to very extensive entailed estates in Perthshire and Argyleshire, devolved in terms of the patent and under the destination in deeds of entail, on the nearest heir male. During his Lordship's lifetime,

and up to the time of his death, no doubt was known to have been entertained, and certainly no question was raised, as to the title of John Alexander Gavin Campbell, of Glenfalloch, to succeed as such heir. His claim rests on the allegation that he is the great grandchild of William Campbell, of Glenfalloch, who died in 1791, through his second son ; but his claim is now disputed by Charles William Campbell, Lieutenant in the Bengal Cavalry, and commonly known as Boreland, who is admittedly also a great-grandchild of the same Glenfalloch, but through his sixth son. There is no dispute as to the fact that the descendants of the eldest and intermediate sons of old Glenfalloch are all extinct, nor can there be any question as to the right of J. A. G. Campbell (now bearing the title of Earl of Breadalbane, and in actual possession of the estates), whom we shall henceforth call Glenfalloch, provided his descent be legitimate. But this is denied by Boreland ; the single, but, as we shall presently see, by no means simple, point at issue between the parties being whether Glenfalloch's grandfather and grandmother were ever married.

“James Campbell, the second son of old Glenfalloch, and the person whose marriage is in dispute, was, in 1781, stationed at Bristol with a recruiting party of his regiment—the 40th Foot—in which he then held a commission as lieutenant. There appears little doubt that about the beginning of that year he eloped with Eliza Maria Blanchard, wife of Christopher Ludlow, a grocer and apothecary in the village of Chipping Sodbury, about ten miles from Bristol. During the latter part of the same year we have traces of him as engaged in regimental business both in Glasgow and Edinburgh. Thereafter, he appears to have been quartered for about eight months at Exeter, and in the summer or autumn of 1782 he sailed for America with a detachment of recruits. After remaining at Halifax, Nova Scotia, for about two years, he returned to England in February 1784, in the Prince of Orange transport. Except from a most important document, which we shall afterwards have to refer to at some length, there is no proof, whatever the probabilities may be, that Eliza Blanchard accompanied him to Scotland. From the date of the elopement, and up to the birth of a daughter, who was baptized at Devonport in May, 1785, we have only two notices of her,—a letter written from Glasgow on 7th September, 1783, by Colin (James's

eldest brother), to another brother in Jamaica, in which he says—‘I had a long letter from James lately, from Halifax. He and Mrs. Campbell were both well. He does not mention having any increase to his family, and, for aught I know, they consist of no more than himself and his wife, whom I never saw, but she is exceedingly well spoken of.’ We have also the fact, that in the list of officers, soldiers, and women, who returned in the *Prince of Orange*, under the command of James Campbell, the first name which occurs among the list of women is Mrs. Eliza Campbell. From other evidence which we need not go into, there can be no doubt that this Mrs. Campbell and Eliza Blanchard are the same person. Shortly after, and no doubt in consequence of the elopement, Ludlow threw up his business in Chipping Sodbury, and embarked for New York as a surgeon’s mate. He remained there till 1784 in hospital practice, and, curiously enough, arrived in Portsmouth only about a month before the arrival of his wife and her seducer at Plymouth. Shortly after his arrival, and apparently while still on shipboard, Ludlow died, and as notices of his death appear in newspapers of that date, we may not unreasonably conjecture that a fact so important to them came to the knowledge of James Campbell and Eliza Blanchard. Up to this date their cohabitation must have been adulterous, and any ceremony of marriage bigamous; but from this time they were free to marry, for adulterers are, by the law of Scotland, prohibited from intermarrying only in a case of divorce having been obtained.

“It appears, however, that he visited his father at Glenfalloch in 1785, and during that visit probably announced his marriage to him. This may be gathered from the fact that in the following year we find the latter considering the propriety of disinheriting James, for his refusal to give any account of his wife or her family, ‘further than that she is his wife.’ This intention was not carried into effect; and the old laird died in 1791. Where or how the parties lived about this period, and up to 1793, and whether in Scotland or in England, does not appear very clearly from the evidence. There are, however, two entries in the register of baptisms at Gateshead, near Newcastle—the one entry, which is dated 20th January, 1788, is ‘Wm. John Lambe, S. of Jas. Campbell;’ and the other, dated 6th October, 1789, ‘Susannah Sophia, D. of Jas. Campbell.’

It is satisfactorily proved that these entries refer to a son and daughter of James Campbell and his reputed wife, and that the first entry refers to Glenfalloch's father. In the books of H.M.S. Prince of Wales, to which the same person, on 29th Sept. 1807, was appointed midshipman, his age is stated to be nineteen, and his birth-place Edinburgh. The two entries, whether correct or not, are not inconsistent, and perhaps not very material.

"In 1723, the Breadalbane Fencibles were raised by the Earl (afterwards first Marquis) of Breadalbane. He became colonel of the regiment, and through his recommendation James Campbell obtained first a lieutenant's and afterwards a captain's commission in the regiment. Campbell continued with this regiment, which, agreeably with the terms on which it was raised, was never out of Scotland, until it was disbanded in 1799. He then joined the Cambrian Rangers, which were at that time stationed at Gibraltar; and, on their being disbanded in 1802, he returned to Edinburgh, where he remained until his death, which took place in 1806. During this latter period, there is the most convincing evidence that he lived with and acknowledged Eliza Blanchard as his wife; and she was recognised as such by his relations, friends, brother officers, and the public generally."

The decision of the House of Lords given on the 16th ult., has established this marriage, and consequently the claim of Campbell of Glenfalloch to be Earl of Breadalbane.

We feel quite safe in asserting that Mr. Nichols's "*Herald and Genealogist*" should form an adjunct to every law library, large and small.

Sir Bernard Burke's works are peculiarly adapted for legal research, from the full pedigrees they contain. The detail of the pedigree in these kind of books will sure to be, sooner or later, the safeguard of truth. The pedigree, no doubt, may come simply from the representative, or some other interested member of the family, and he who edits it may be deceived. Happily for the honour of the nobles and gentry of Great Britain and Ireland, such instances of deception are very rare; and when they do occur, the very exposition of the pedigree

lays the falsifying party open at any moment to detection. Sir Bernard may, like all genealogical writers, be unknowingly led into incorrectness—but the actual great publicity, and great amplitude of his productions, and the correction they constantly undergo, cause them to visibly improve as they proceed from edition to edition. Years of labour and perseverance have done much; and though years may yet have to pass before perfection be attained, it is not much to prognosticate that the works carried on by Sir Bernard Burke will eventually be the standards by which most of the genealogy of these realms will be tested. As far as lawyers are concerned, his books are useful to consult, and right pleasant to peruse. In his huge tome—"The Dictionary of the Landed Gentry"—not only do all the pedigrees provide sources for legal proof, but many of them let us into the lives and family history of many a legal luminary past and present. What a lot of legal narrative is there in the following account from "The Landed Gentry" of the

**"FAMILIES OF PLUNKETT AND TREGIAN.**

"The present COL. DUNNE, of Brittas, is, through his grandmother, Margaret Plunkett, one of the representatives of the distinguished family of PLUNKETT of Dunsoghly, as well as of the TREGIANS of Tregian, in Cornwall.

"ROWLAND PLUNKETT, youngest son of Christopher, 1st Lord Killeen, *temp.* HENRY VI., by Joan, his wife, daughter and heir of Sir Lucas Cusack, married Catherine, daughter and heir of John Berford of Longhore, co. Meath, and was father of SIR THOMAS PLUNKETT, of Dunsoghly, Chief Justice of the Common Pleas in Ireland, *temp.* HENRY VIII., whose son CHRISTOPHER PLUNKETT, Esq. of Dunsoghly, A.D. 1517, married Catherine, daughter and heir of Philip Bermingham, and was succeeded by his son SIR JOHN PLUNKETT, Knight of Dunsoghly, born 1504, a learned lawyer, who was constituted Lord Chief Justice of the King's Bench in 1559.

"The TREGIANS were an ancient British family of great account in Cornwall even before the Norman Conquest. FRANCIS TREGIAN, son of Thomas Tregian, of Volvedon or Golden, in Cornwall, by the



eldest sister of Sir John Arundell, of Trehern, great-grandson of Elizabeth Woodville, Queen of Edward IV., by her first husband, John, Lord Grey, of Groby, was, in the year 1557, tried for recusancy and other crimes against the state. He admitted the recusancy, but denied the other accusations. He was, however, by false evidence, found guilty, and sentenced to perpetual imprisonment, his property seized, and his wife and children, and neices, Andrian and Mary, turned out of his house. He continued in prison, in Launceston Castle, subject to every misery, and almost starved; the account of which is given in a note by Gilbert, in his *Survey of Cornwall*, vol. ii., p. 264. Those who got his estate tried to assassinate him, and he strove to escape, but being found out he was loaded with irons 30 lbs. weight, and put into a dungeon. After some time he was restored to his former cell, or apartment. At length his wife obtained permission for his transfer to the Queen's Bench, but the officers who conducted him demanded £50, a sum which he was unable to pay, and that he in vain petitioned the court to forego. He was removed to the Fleet Prison, where he was received 13 July, 1593. His lady lived with him in prison, and he had by her, eighteen children, eleven being born during his incarceration. Most of them were alive in 1593, the date of the manuscript from which these particulars are taken. The last mention of this unfortunate gentlemen is in the diary of the English College at Douay, where it is stated that in July, 1606, one Mr. Tregian, an ancient gentleman, after above thirty years' confinement, arrived there on his way to Spain.

"He married Frances, daughter of Charles Lord Stourton, by Anne, his wife, daughter of Edward, Earl of Derby, and had issue. Of his daughters, Mary, the eldest, married Thomas Yates, Esq., of Berkshire; and Philippa became the wife, as already stated, of JAMES PLUNKETT, Esq., of Dunsoghly. Of the sons, the eldest, FRANCIS TREGIAN, Esq., was partially restored to his estate, but finding it impossible to bear up against the tide of persecution, he compounded with the Crown, sold his property, and passed over into Spain, where he was honourably and becomingly received, and raised to the rank of Grandee. His posterity are said still to exist in that country under the name and title of the Marquis d'Angelo."

We cannot resist another extract from the same book, be-

cause it tells us of an ancient Scottish house just raised to the Peerage through legal distinction :—

“M'NEILL OF COLLONSAY AND GIGHA.

M'NEILL, JOHN, Esq. of Collonsay, co. Argyle, married Hester, daughter of Duncan M'Neill, of Dunmore, and had issue,

I. ALEXANDER, younger, of Collonsay, born 17 Jan., 1791 ; married 24 June, 1830, Anne Elizabeth, 4th daughter and co-heir of John Carstairs, Esq., of Stratford Green, Essex, and Warboys, co. Huntingdon, and had issue, JOHN CARSTAIRS, major in the army, and A.D.C. to Gen. Cameron, born in March, 1831 ; Alexander, born Feb., 1834, married Frances, 2nd daughter of Rear-Admiral Talbot ; Duncan, born July, 1836 ; Malcolm, born March, 1838 ; Cecil Anne ; Helen ; Hester Mary. Mr. M'Neill, younger, of Collonsay, acquired Gigha, the ancient possession of his clan.

II. DUNCAN (Right Hon.), Lord Justice General and President of the Court of Sessions, in Scotland (now LORD COLONSAY), born 1794.

III. John (Sir), G.C.B., late Envoy and Minister Plenipotentiary to the Court of Persia, born 1795 ; married 1828, the 4th daughter of John Wilson, Esq.

IV. Malcolm, lieut.-col. Madras native cavalry, and member of the military board.

V. Archibald, W. S., director of Chancery.

VI. Forbes, merchant in London.

LINEAGE.—DONALD MACNEILL, of Crear, 2nd son of Neill Macneill, of Arichonan, representative of a younger branch of Macneill of Taynish, exchanged, in the year 1700, the lands of Crear and others for the Islands of Collonsay and Oronsay. He married in 1676, Mary, daughter of Lachlan Macneill, of Tirfergus, and had five sons,

I. MALCOLM, who succeeded him.

II. Neill of Macneill, of Ardachy.

III. Archibald.

IV. Hector.

V. John.

"MALCOLM MACNEILL, of Collonsay (the eldest son), married Barbara, daughter of Campbell of Dunstaffnage, by whom he had three sons,

I. DONALD, of Collonsay, married Miss M'Neill, of Belfast, by whom he had an only son—

ARCHIBALD M'NEILL, of Collonsay, who married Lady Georgina Anne Forbes, daughter of the Earl of Granard. He sold the estate of Collonsay to his cousin, JOHN M'NEILL, Esq.

II. ALEXANDER, of Oronsay.

III. Angus.

The second son,

ALEXANDER MACNEILL, of Oronsay, married Mary, daughter of Alexander M'Dougall, of M'Dougall, and had six sons,

I. JOHN, of Collonsay.

II. Malcolm, late of the E. I. Co.'s service.

III. James, deceased.

IV. Donald, lieut.-col. of the 91st. regiment.

V. Alexander, and VI. Archibald, both deceased.

*Seat*—Collonsay."

Of all professions, that of the law should encourage and promote ample works on genealogy. Such books, landmarks as they are of family history, preserve domestic records and point out the right claimants to honours and property. In so doing they either save from wasteful litigation, or, when a legal dispute unavoidably arises, they clear many a difficulty, and often lead to the unanswerable elucidation and establishment of the truth.

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#### ART. V.—COLONIAL LEGISLATIVE BODIES.

IF we may judge from the language of those who, in Parliament, or on the lower benches of justice, or through the press, have been ventilating opinions more or less incidental to the subject of our paper on "Martial Law," we must conclude

that there exists a very general indistinctness of impression with regard to their true legal value. Foremost amongst these incidental opinions is that which many people, who should know better, are in the habit of throwing out, as to the power of colonial assemblies to change, and even to take away, the fundamental laws which are the birthright of every Englishman, and which are said to accompany him into every British dominion to which it is his pleasure to go; or to obstruct and prejudice the free enjoyment of those constitutional rights, by their own special, private, and exceptional enactments. It seems to have been taken for granted that the power exists. A question indeed was raised as to the efficacy of such enactments to bind or control the courts of the realm; and a stronger symptom of our distempered state, there cannot well be told, than the fact of such a question having been seriously stated and considered. But as to the colonial courts, it seemed to be assumed, without question, that they, at least, were bound to give effect to whatever legislation of that sort it might please the assembly, however constituted, of their particular colony to put forth. Because a handful of "mean whites" had received from the Crown the authority to frame regulations, which should be in conformity with the laws of England, for the government of themselves and their fellows, in some island of the Caribbean sea, there was no misgiving on either side as to the local validity of whatsoever measures those men under the pretext of their powers, chose to perpetrate to the suspension or even to the undoing of those English laws, themselves. They might make and unmake the judicature after their own fancies, suspend or abolish the writ of *habeas corpus*, empower the local governor, upon whatever occasion, to declare Martial Law, which, as they interpreted it, meant the repeal of all laws at once, and the enactment of nothing in their place, and at his pleasure (if he so read the Great Charter), to "imprison, outlaw, and destroy the free, *without* the *judicium parium*, or the *lex terræ*," and, finally, to deprive the subject for ever and ever of all right of recourse, even against outrages committed

in excess of their own legislation, by the mere addition of one more measure to the tale, an Indemnity Act.

Now all this is simply erroneous. The general condition of all legislation by provincial assemblies—a condition of which all courts are bound to take notice—is that “it shall not be repugnant to the law of England.” That proposition is applicable to all the colonial dependencies of the Crown, whether acquired by plantation, by conquest, or by treaty. It has, indeed, not unfrequently been stated, in the stronger form of the positive, that “their legislation shall be, so far as possible, conformable to the law of England.” But either form is sufficient for our present purpose. And, although in the commissions and charters, royal or parliamentary, under which the various assemblies or councils are convened, the two forms are indifferently used, it may be thought that the latter is more properly applicable to colonies by plantation, than to colonies by conquest or cession, whilst the former is applicable to all alike. So much for the great and necessary condition whereby the supremacy of law over the affections and antipathies of the local legislature is preserved. Let us now see how that condition is enforced.

There are two ways to that end. The Crown may disallow the Act which contravenes the condition; and, whether so disallowed or not, the Act may be declared by the judiciary to be *ultra vires* and void. In some colonies, *e. g.*, New South Wales and Van Diemen's Land (before they had their present constitutions), a third course was provided by Parliament, which aided but did not exclude either of the other two. Every new enactment was required to be transmitted as soon as passed to the Supreme Court for enrolment or registration there after perusal. The judges were empowered and required to make a “representation” within a limited time, certifying to the local legislature whatsoever repugnancy (if any) to that Act or to the laws of England there might be discovered, upon such perusal, to the validity of the Act. The legislative council thereupon had to reassemble and review their legisla-

tion. If they thought fit, they might adhere to it; but the certificate would be sent home, and the Secretary of State thus apprised of the objections raised to the validity of the new enactment.\* But even in that case, and after approval by the Crown, it did not necessarily become law. There still remained behind the common and inherent authority of every court of judicature, within the colony and without, to examine and to pronounce upon the constitutional validity of the enactment. Nor could the Australasian judges be allowed to decline the exercise of that authority, even if they had already at that earlier stage examined and pronounced, still less if they had merely omitted, or neglected, or declined the duty.†

It is too much the fashion to forget that every power contains within it a corresponding duty—namely, that of using it according to the intention of the authority by which it was conferred. This is especially true of powers and authorities of a public nature; and, amongst these, we know of none with regard to which it is more true, than the powers of disallowance, and avoidance of colonial enactments, respectively vested in the Queen and Her Majesty's courts of justice. It was said—and well said—by the late Sir John Lewes Pedder, Chief Justice of Van Diemen's Land, in the case last cited, that—‡

“He admitted that he had official notice by the Gazette that Her Majesty had approved of the Act of Council . . . that the judges had not certified that the Act of Council was repugnant to the Act of Parliament . . . and that the duty of doing so was cast upon them by the 22nd section, if they perceived the existence of such repugnance. . . . But it did not, therefore, follow that . . . the Act would, notwithstanding any such repugnancy, be binding until Her Majesty's pleasure were known, nor that, in such case, it would be binding, even after Her Majesty's allowance of it. . . . After careful reflection, he had come to the opinion that the Act of Council,

\* 9. Geo. IV., 83, ss. 22-25, 26-29.

† Judgments pronounced in *Symons v Morgan*, (Hobarton, Supreme Court in Banco 29 Nov., 1847), in the “Commons' papers relative to Van Diemen's Land:”—(566 of 1848) pp. 75-81.

‡ *Ibid* pp. 76, 78.

in such case, would not be binding. . . . The legislative assembly of a colony could not, at its own will and pleasure, enact whatever it thinks fit. For example, it could not alter the common law of England. . . . It was a necessary qualification of such laws (citing from Chalmers the opinions referred to elsewhere in this article) that they should be reasonable in themselves, and not contrary to the laws of England ; and that, if any laws had been made there repugnant to the laws of England, they were absolutely void. . . . If the question arose. . . . it was not only competent to the Court, but it was their duty to decide upon it. . . . If he was right . . . the Act of Council was repugnant to the Act of Parliament . . . and no validity being given to it, by statute, . . . it was not binding on her Majesty's subjects in that colony : and the conviction founded on it must be quashed.' Mr. Justice Montagu,\* 'without reservation, entirely agreed in all the observations' of the Chief Justice. 'He could not doubt the right of the subject to come to that Court and object to an Act of Council. . . . They were called upon to declare what the law was ; and, if such a duty was not in the Court, the subject would be left without any remedy. In that case . . . the subject would be deceived into an opinion that he had rights, and then find out that he could not act upon them. . . . The Act of Council was invalid . . . it was no Act at all : and the conviction must be quashed.' "

There was nothing special in the circumstances of that case. The legislature of the colony had passed a series of Acts during several years of the present reign, which had been confirmed by Her Majesty, all relating to one subject—taxation—and all defective, as it turned out, in that none of them contained an appropriation clause, but by all of them the appropriation was left generally to the governor. This was certainly a departure from the established principles of the constitution. It was also opposed to the letter of the Act of Parliament, by which the council was set up. The defendant, Mr. Morgan, on those grounds, refused to pay the tax appointed by one of the Acts—the Dog Act. The petty sessions deciding against him, he carried his appeal to the

\* *Ibid*, pp. 78, 81.

quarter sessions, and thence to the Supreme Court. The result has been stated above—and there can be no doubt that the governor was well advised in carrying the case no further; for undoubtedly the Privy Council would have taken a most unpleasant view of the case.

No court of justice, having such duties to perform, will be excused for its own non-performance merely because it has paused to inquire whether others also have performed their appropriate duty, or failed to perform it. Irksome and delicate, no doubt, that duty is, and one not free from danger. Judges are liable to “suspension by the governor, until the pleasure of the Secretary of State is known.” They are also “amoveable by the governor in council,” according to the statute—subject, of course, to their right of appeal to the judicial committee, a right not to be enjoyed without cost. We recur to the case of *Syme v. Morgan*, for it affords an illustration of either remark. The learning and honesty evinced by the judges, in declaring the nullity of the Act of the colonial legislature merely because of its repugnancy to English statute law, surely deserved approval and not blame, even at the hands of an offended Governor. But it was far otherwise; and at the risk of a digression, we will now relate the sequel.

The judgments in question had been delivered, as we have said, on the 29th November, 1847, in the remote colony of Tasmania, then called Van Diemen’s Land. Within a few hours afterwards, with the concurrence of his two law advisers, whom he intended to make available, if the experiment succeeded, in clearing the bench of the obnoxious two judges; his excellency sought and obtained the help of his executive council, towards the achievement of that very questionable undertaking. But the success was partial only, and by no means answerable to the design.

It was proposed by the governor to his executive council, to begin at once, “by suspending the judges,” and so to give “a timely check to the spirit of defiance to the law!” The council on their side, were not slow to “concur generally with



His Excellency in his views as to the suspension of the judges." But they recommended, on the motion of one of their number, "that, in the first instance, some suggestion ought to be made to Sir John Lewes Pedder" (the chief justice), "to induce him to retire," and that "during his suspension, should that be necessary, he ought, if practicable, to have secured to him his accustomed salary and precedence in the colony."\* The Governor, however, was deterred from offering so palpable a job to the acceptance of the Chief Justice, for "his character stood deservedly high in the colony," and the Governor was compelled "to declare his belief, that he was actuated in giving his judgment by a sense of what he believed to be his duty."† Moreover, the other—and only remaining—member of the court, the Puisne Justice, had, in the mean time, been got rid of, by the process of "amotion," for what is called by neologists, "undue indebtedness." We may even assume that, notwithstanding the suspicious coincidence of dates, the "amotion" may have been sustainable on the merits; for it was not reversed in the Privy Council, nor was the ostensible ground, viz. :—(his being indebted within the colony to an extent embarrassing to himself in the administration of justice) displaced by that gentleman at the hearing of his appeal.‡ But the triumph was only one of three days duration. It was found that the promotion of the attorney of the local government to the vacated seat was not enough, to prevent judgment being rendered against that government in any one of the many matters still pending in the supreme court, in which the same vices of the local legislation would come in question. It was ascertained by the Governor in council, that the changes already effected in the constitution of the court were not sufficient to secure its judgments to the governments, because, "when the

\* Minutes of the Executive Council (30 Nov., 1847), in Commons' papers relating to Van Diemen's Land (566 of 1848) pp. 62, 63.

† Despatch from Sir William Denison of the 18th February, 1848, in Commons' papers (566 of 1841), pp. 56, 58.

‡ *Montagu v. the Lieut.-Governor and Executive Council of Van Diemen's Land.* 6 Moor, Pr. C. C. 489.

court is divided, the plaintiff gets judgment."\* The removal of the Chief Justice, upon any terms, again became the topic of the moment. A government letter was addressed to the Chief Justice, which is justly characterised by the Petition of Complaint to the Queen, signed by 1,570 colonists,† as "an insulting proposition, censuring in the strongest terms the decision which had been given by him in his judicial capacity, and intimating that no alternative was left him but to apply for leave of absence."

The minute of council which authorised, and the despatch which reported to Earl Grey the monstrous proposal, have respectively described it as a measure "considerate to his feelings,"‡ and one which "relieved the government from the necessity of taking what must inevitably have appeared to be harsh steps against a person in his position."§ But the stern honour of the chief justice was proof against it all. He refused the proffered leave of absence: one of "eighteen months, so as to admit in the interim of the requisite remedial measures being taken," etc., etc. :—and he expressed "his readiness to meet any distinct tangible charge."|| Accordingly fresh charges were prepared, embodying in effect only one proposition, viz. : that he had been guilty of false judgment, if his law were wrong—but, if right, then of *laches* in not having come to that conclusion a little sooner.¶ But this sophistry was too much even for a Vandemonian council; and of the fresh charges he was honourably acquitted. The old ones remained in pendency a little longer.\*\* But the public indignation was now at its height, and had invaded even the sacred precincts of Parliament. The petition to the Queen was graciously received. The House of Commons heard with satisfaction the grave censures

\* Minutes of Executive Council, etc., in Commons' papers relative to Van Diemen's Land (566 of 1848), pp. 62, 63.

† Petition: *Ibid.*, p. 111.

‡ Minute of the 4th January, 1848: *Ibid.*, p. 63.

§ Despatch of the 18th February, 1848: *Ibid.*, p. 56.

|| Letter of the 6th January, 1848: *Ibid.*, pp. 64, 65.

¶ Minutes and Proceedings: *Ibid.*, pp. 65-72.

\*\* Despatch, etc.: *Ibid.*, pp. 58, 59.

of the colonial department upon the follies of their pro-consul. And Sir John Lewes Pedder's seat was strengthened upon the bench for the remainder of his honoured life.

We are not asking for overmuch commendation of the course taken by those upright judges. They did their duty, and no more. They made no new paths. They followed the beaten track of which the precedents of two hundred years, coeval with the colonial dominions of the monarchy, and enunciating principles older than that monarchy itself, had set them, when they refused to recognise the omnipotence of the colonial law-givers.

"It cannot be granted them," as was well observed with regard to one of those little Parliaments in the days of Queen Anne,\*

"that they are capable to enact at their own will and pleasure what they think fit. For they cannot, by a law, alter the common law of England, and the settled course of proceedings thereon. They cannot change the common securities of the kingdom. They cannot enact anything against her Majesty's prerogative. They cannot take away, by any Act they can establish, any authority vested in the governors by her Majesty's commission : with many other things too many here to be enumerated. And they cannot pretend to have an equal power with the Parliament of England."

It is peculiarly the duty of the supreme courts of the several colonies, to exercise a vigilant scrutiny into the measures of the local legislatures. Some are more than others restricted in their powers to legislate. But there is not one which, more or less, is not so restricted. Were it otherwise, they would have and exercise a power co-ordinate with parliament;—a state of things identical with political independence of the Crown. But those restrictions being legal only, no other way to enforce them can be so much as conceived, unless the judiciary have the power. Therefore it is to that

\* Barbados : Rawlin, A. G. (*temp. Ann.*) Chalmers (edition of 1858), p. 376.

judiciary that the constitution has in fact confided it: as part and parcel of their general function, of declaring and dispensing to the Queen's lieges within the colony, the laws and rights which accompany the Englishman to the place of his settlement, wherever it may be, so that the English flag waves over it. It were pedantic to cite in detail the authorities for the well-known positions collected in the learned and standard work of Mr. Charles Clark.\*

"The common law of England (West L. C.), is the common law of the plantations, and all statutes in affirmance of the common law, passed in England, antecedent to the settlement of any colony, are in force in that colony, unless there is some private act to the contrary, though no statutes made since those settlements are there in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear. 'The inhabitants' (Lords Camden, C.J., and Hardwicke, L. C.), 'as English subjects, carry with them your Majesty's laws, wherever they form colonies, and receive your Majesty's protection.' 'In a place occupied by the King's troops,' (Lord Ellenborough, C. J.), 'the subjects of England would implicitly carry the law of England with them.'"

Now the exposition of that law belongs to the courts of justice and to none other.

It is impossible, so long as the relation of dependency between the mother country and the distant dominion endures, that the control of the judicature over the possible excesses of the legislature can be altogether lost. The "dominion" of Canada has attained as nearly to independence as it seems possible to go without ceasing to be dependent. The Australias, Tasmania, and New Zealand have received almost as largely from the bounty of Parliament, with respect to their own legislatures. But in none of the Acts by which the delegation was conferred are the reservations wanting, without which those territories would cease to be British. Nor is the Indian legislature less restricted.

\* Mr. Clark's "Summary of Colonial Law," etc. (1834) p. 8: note (4.)

Very much to the contrary of that, the Acts of Parliament which regulate and control it might well stand as declaratory of the universal common law restraints, from which, in so great a measure, Canada, the Australias, Tasmania, and New Zealand are now unfettered by statute. For they reserve; \*—1. The particular Charter Act. 2. The Acts relating to the army. 3. The legislative power of Parliament. 4. The prerogative of the Crown. 5. The general authority of Parliament. 6. The constitution or rights of the Indian government. And—

“7. The unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown, over any part of the said territories.”

It was very reasonably doubted by a late Viceroy, † whether under powers so restricted it was competent for that legislature to give the effect of law to a Bill of pains and penalties, or indeed to any retrospective measure:—“an authority which the Imperial Parliament itself does not put forth, except upon the rarest occasions, and at distant intervals.” At a subsequent period, and with reference to a very different measure (the Indian Wagers’ Act, No. 21, of 1848) the Supreme Court of Bombay, refusing to allow it to have a retrospective effect, quoted with approbation the views so expressed by the Governor-General in council.

“I agree,” said the learned Chief Justice (Sir Erskine Perry) † “with the Governor-General,—that it would savour of much impropriety, and be opposed to all constitutional doctrines, for a body like the legislative council, with its limited power and very peculiar composition, to attempt to give a retrospective operation to a statute of this kind.”

\* 3 & 4 Will. IV., c. 85, s. 43; 24 & 25 Vict., c. 67, s. 22.

† *In re* The Ecclesiastical Registrar of Calcutta. Minute of the late Marquis of Dalhousie in Council: *apud* “Oriental Cases,” (post) p. 223 note.

† *Ramlal v. Dulabdas*, 1849; Oriental Cases, p. 223.

If the Marquis of Dalhousie and Sir Erskine Perry had ever heard of the then recent case of the Van Diemen's Land judges, it is pretty plain that it had no terrors for them. And, if they could have foreseen the quantity of nonsense with which, in eighteen years, the world was to be deluged on the subject of the endeavour of a Jamaica governor and assembly to estop men from complaints and demands of justice against their tyrannies, by means of a retrospective Act for their own indemnity, it is very probable that they would have expressed a still stronger condemnation of the pretensions to which they referred.

It must never be forgotten that this question in nowise turns upon the necessity of confirmation at home, or the liability to disallowance. No such necessity or liability existed in the case of the Indian legislature. We will mention an older example.

Connecticut was not "under any obligation by charter to return the laws made in that plantation for approbation."\* Yet that did not release Connecticut from the common rule.

"We," that is to say (the Lords Hardwicke and Talbot of the future) "are of opinion that by the said Charter the general assembly of the said province have a power of making laws which affect property ;—that it is a necessary qualification of all such laws that they be reasonable in themselves, and not contrary to the laws of England :—and that, if any laws have been there made repugnant to the laws of England, they are absolutely null and void."†

As little adapted was or is the mere lapse of time, or length of user or acquiescence, to cure the invalidity or affect the power of declaring it.

The North Carolina enactment of 1715, which postponed the execution of all judgments within the province for "foreign debts," and gave priority to "country debts," continued in use

\* Opinion of Northey, A.G., July 22, 1714; Chalmers, 340.

† Opinion of Yorke, A.G., and Talbot, S.G., August 1, 1730. *Ibid.*, 341, 342.

and was submitted to from its passing down to 1747, when it was declared to be\* "contrary to reason, inconsistent with the laws, greatly prejudicial, and therefore unwarranted by the charter, and consequently void."

No doubt the power of disallowance is in itself a very considerable security. But it may be abused, or neglected; and in general the time within which it may be exercised is limited by Act of Parliament. There is no such statute of limitation to the judicial function of exposition of enactments; and there is much less danger of misuse or *laches*, on their part in whose hands the power is placed, of declaring the blot which the merely ministerial eye has failed to detect. Still the duty exists for each; and it demands from each a prompt and vigorous performance. To this end (amongst others no doubt) exist the costly establishments of colonial governments abroad, and those of the Colonial Office at home, not to speak also of those of the Privy Council, and its committee, the Board of Trade and Plantations. If a single enactment of a local legislature, *ultra vires* of that body, is suffered to escape disallowance, a breach of duty has been committed somewhere; for which the offending or defaulting officer is punishable. But not for that, as we have said, does the enactment become one whit more legal. If, through official connivance or incuriousness, it has escaped disallowance, or if there has not been time to take into consideration and decide the question of disallowance, there yet remains the other security of liberty and right. It is the duty of the judges, in whose keeping that security is reposed, to extend it to every case which is fitted to receive it; and this without caring to know whether others have performed their appropriate duty too, or failed in that performance. Irksome and delicate, we repeat, that duty is, and one which when judges are "amoveable" at pleasure and command, is as we have seen, by no means free from danger, or at least annoyance and obloquy. But "to this, among the rest, are they

\* Opinion of Dudley Ryder, A.G., and Murray, S.G. (afterwards Lord Mansfield), June 3, 1747. *Ibid*, 402.

ordained:"—and the governor who should "amove" a judge for refusing to put in execution an illegal enactment, would be a bold man, if aware, and a very ignorant man, if not aware, of the salutary effect produced upon the Home authorities by the public opinion and parliamentary debates of 1848, with respect to the high-handed means of Sir William Denison, upon which we have expressed our censure.

The practical value of a principle is best shewn by an enumeration of instances of its working. We think that the following selection is sufficiently numerous and miscellaneous withal, to enable anyone to form a very clear appreciation of the finite and limited nature of the power which provincial assemblies or councils, whether representative or not, possess of making laws for their respective colonies without the express authority of an Act of Parliament empowering them to go further.

They cannot make any law, whereby a political or civil disability or incapacity is imposed upon the subject—alien or natural: for that would be an invasion of the Queen's prerogative of protection,\* to which, of course, allegiance is the correlative. They cannot deprive the subject of his right of trial, or of appeal, or divest him of a single one of his other rights, personal or proprietary, without such trial or appeal.† They cannot adjust proprietary rights by the measure of rules of state and policy, nor to the prejudice of third parties.‡ They cannot withdraw offenders from the justice of the law, by passing Acts for the pardon or indemnity of such.§ They cannot abolish the king's courts of justice,|| nor create new

\* Jamaica; Northey, A.G., July 9, 1706; Chalmers, p. 350; Virginia;—West (afterwards Lord Chancellor of Ireland), Jan. 16, 1723. *Ibid.* pp. 439, 440.

† Barbados, Rawlin, A.G., temp. Annæ. *Ibid.* 375, 382.

‡ Jamaica, Fane, March 3, 1725-6. *Ibid.* 357, 359.

§ New Jersey, Ryder, A.G., and Murray, S.G., July 21, 1749. *Ibid.* 448.

|| Jamaica, Ryder, A.G., and Murray, S.G., June 22, 1753. *Ibid.* 434.



courts, or offices of justice.\* They cannot take away or intermeddle with the freedom of the Bar in relation to their clients, and the right of retainer.† They have no power to enact the slaughter of runaways, nor to attain even a negro slave, without giving him a day to render himself, even where charged as a robber.‡ The same principle deprives them of all power to enact indefinite or arbitrary imprisonments of whatever kind; § and likewise that of superadding the aggravation of hard labour in the case of a debtor in execution, or civil prisoner, and the hiring out the labour of such prisoner against his will. || They cannot impose a tax or duty on any importation of goods belonging to British subjects, in the nature of a burthen upon trade. ¶ Not only have they no power to pass Acts for creating a currency, or a paper credit, or changing or adding to the laws relating to either of those matters;\*\* but, if they attempt it, their members actually taking part in such attempt incur the penalties of a high misdemeanour, and the franchise itself, if holden under royal grant, may be seized into the Queen's hands.†† Lastly, matters cognisable in or belonging to the Admiralty jurisdiction, are beyond their own: and all enactments of theirs relating thereto are *ultra vires*, and encroachments upon the prerogative, and the authority of Parliament, and must therefore be held to be contrary to law.‡‡ And greatly as the detestable

\* Massachusetts Bay, Northey, A.G., April 21, 1703-4. *Ibid*, 195  
Barbados; West (afterwards Lord Chancellor of Ireland), June 18, 1720. *Ibid*, 196-8.

† Jamaica, Eyre, S.G., May 12, 1710. *Ibid*, 401.

‡ Barbados, Northey, A.G., October 20, 1703. *Ibid*. p. 509. Virginia. Northey, 1701. *Ibid*. p. 407.

§ Barbados: Rawlin, A.G., *ubi supra*. *Ibid*, 377.

|| Bermuda: Harcourt, S.G. (afterwards Lord Chancellor), Dec. 6, 1703. *Ibid*, 411, 412, 414.

¶ Carolina: Thompson, S.G., April 5, 1718. *Ibid*, 586, 7.

\*\* All the Plantations: Northey, A.G., October 19, 1705. *Ibid*, p. 611; Pennsylvania: West, May 10, 1725. *Ibid*, pp. 441, 2. Carolina: Sir M. Lamb, Dec. 14, 1748. *Ibid*, pp. 426, 428. New Jersey; Ryder, A.G., and Murray, S.G. *Ibid*, pp. 447, 8.

†† All the Plantations: Northey, A.G., *ubi supra*.

‡‡ Barbados: Northey, A.G., Oct. 20, 1703: *Ibid*, p. 710. All the Plantations, West: June 20, 1720. *Ibid*, pp. 511-521.

institution of slavery, whilst recognised by English and British Acts, did, no doubt, qualify as between master and servant, the value of these safeguards, yet, neither colour nor descent, was ever suffered to make, amongst the free, any distinction whatsoever.

"I agree," writes West, afterwards Lord Chancellor of Ireland,\* "that slaves are to be treated in such a manner as the proprietors of them (having a regard to their number) may think necessary for their security. Yet I cannot see why one freeman should be used worse than another, merely upon account of his complexion. . . . It cannot be just, by a general law, without any allegation of crime or other demerit whatsoever, to strip all free persons of a black complexion (some of whom may, perhaps, be of considerable substance) from those rights which are so justly valuable to a freeman."

He is, in fact, "an Englishman" within the meaning of every Act of Parliament for securing liberty or right, from the Great Charter downwards. For the colony—whether one of plantation or of conquest,—is a British plantation. And whatever may be the origin of its inhabitants, they, as such, are all, in the eye of the law, "natural-born subjects" of the Crown, and therefore "English" or "British," and the king's "liege subjects." So that, in short, a conquest or cession, or the combination of both, operates to effect an immediate naturalisation of all the inhabitants, and that a far ampler one than any Act of Parliament ever gives.†

We have been able to discover only one instance of a colonial legislature, without specific power, being recognised at law as having authority to pass a Public Special Act, that is to say, an Act having force against all the world, but derogating in

\* Virginia: West, Jan. 16, 1723. *Ibid*, pp. 439, 440.

† All the Plantations: Trevor, A.G. (afterwards Lord Trevor, C. J.), June 4, 1701. *Ibid*, p. 644. Guadeloupe: Pratt, A.G. (afterwards Earl of Camden), Aug. 7, 1759. *Ibid*, pp. 640, 641. C. Yorke, S.G. (afterwards Lord Chancellor), Aug. 13, 1759. *Ibid*, pp. 642, 643. Canada, Florida, and the ceded Islands in the West Indies: Norton, A.G., July 27, 1764. *Ibid*, p. 647, 648. Compare *per* Lord Mansfield, C. J., *Campbell v. Hall*, Cowp. p. 204.

favour of some party, or body, or place, from the general law. For mere private Acts, in which the *jus tertii* is always reserved, are of no importance in the present discussion. We mean the power to pass Acts for the naturalisation of a foreigner, or of classes of foreigners, or of all foreigners. This exception, however, to the common rule of incapacity is anomalous, we think, notwithstanding the words "*declared and enacted*" in the Imperial Act of the present reign for legalising colonial Acts of naturalisation of times past, and enabling naturalisations to be effected under the colonial enactments of the future.\* The anomaly was perceived and pointed out long ago, and notwithstanding one opinion† in favour of the practice it stood condemned upon constitutional principle by opinions of by far the highest authority,‡ and from the accession of George III. it appears to have ceased altogether, under positive commands from that king.§ Almost contemporaneously, indeed, with the passing of the Imperial Act last cited, the Home authorities gave, for the last time, a signal proof of their fidelity to that policy. The Imperial Act came into force on the day on which it received the royal assent, the 22nd July, 1847, and it was at once signified to the governors of the various colonies for their guidance. It happened that there had been "lying over," in the colonial offices, for a year and a-half past, a certain ordinance, which the legislature of Hong Kong had passed on the 1st October, 1845, "for the naturalisation of aliens within the colony, etc.," with a suspending clause until Her Majesty's pleasure should be known. But for that suspending clause, the ordinance would have immediately on the passing of the Imperial Act itself obtained the force of an Act of Parliament, by virtue of the first section already referred to. The "authorities" in Downing Street availed themselves of the

\* 10 & 11 Vict. c. 83, s. 1.

† New Jersey: Thompson, S. G., March 5, 1718-19; Chalmers, p. 333.

‡ New Jersey: Ryder, A. G., and Murray, S. G., July 21, 1749. *Ibid*, p. 448.

§ Chalmers, p. 661; Compare—*Ibid*, pp. 648, 665.

suspending clause to signify it to be the Queen's pleasure to disallow the local Act, and this by the same mail which carried out for Governor Sir John Francis Davis's guidance, the Imperial Act, empowering him, if he pleased, to pass it over again. And so they stand together, in that governor's "Proclamation" of the 1st January, 1848, and are recorded side by side in the authorised collection of the Hong Kong laws.\* It was the last English protest against the pretention of a petty legislature to make bye-laws for the naturalising of aliens. It was not until five years later, and in the time of another governor (Sir Samuel George Bonham), that the puzzled legislature of Hong Kong took heart of grace, and passed the very limited measure for the relief of aliens, which, we believe, still stands there in stead of a Naturalisation Act.†

If that anomalous instance deserves to be accounted an exception to the otherwise universal rule of the common law, which imposes upon local legislatures an incapacity of derogating in favour of special cases from the common right, or the common liability, it is at least the only exception. Nor does it in any way militate against that universal rule of the same law, which denies to those derivative bodies the power to set particular persons or particular classes above the law, by means of retrospective enactments, and thus to screen them, *ex post facto*, from the natural and ordinary consequences of their own acts.

T. C. A.

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#### ART. VI.—SLADE v. SLADE.

**M**ARRIAGE being a matter of almost universal concern, it is not surprising that the laws relating to it should be matter of almost universal interest; and hence the case of *Slade* and *Slade*, lately heard in the Court of Exchequer, has attracted a

\* Laws of the colony of Hong Kong (1856), pp. 226, 228.

† Ordinance No. 2. of 1853, for the removal of doubts regarding the right of aliens to hold and transfer property within the colony of Hong Kong. *Ibid.*, pp. 389, 390.

more than ordinary amount of public attention and comment. Important and costly as the issue was to the parties, and interesting to the public as the case was from the position of the litigants, and the history involved in it, it was less useful to the lawyer than many cases of far less magnitude and interest have been: for the judges of the Court of Exchequer were divided in opinion on the facts, and agreed in no principle of law raised in the discussion. The result was that no judgment was given; but, in consequence of the rule of practice which makes it usual that the junior judge should withdraw his judgment, in order that error may be brought, the defendant will become entitled to the judgment of the court if the plaintiff elects to carry the case to a higher tribunal.

The circumstances out of which this action arose were as follows:—In the year 1859, General Sir John Slade, a distinguished Peninsular cavalry officer and a baronet, died at a very advanced age. He left behind him a numerous family and a fair estate, which was settled upon his sons and their issue male, in succession. His two eldest sons having died in his lifetime without having issue male, he was succeeded in the baronetcy and estates by his third son Frederick William Slade, so well known in Westminster Hall, the Long Gallery, and on the Western circuit. Sir Frederick died suddenly in 1863, and his death was immediately followed by the commencement of this litigation, the expectation of which had for years hung like a cloud over the fortunes of the family.

Sir Frederick had been married in 1833, at St. George's, Hanover Square, to Barbara Maria Mostyn; and, at his father's death, Alfred Slade, the eldest son of this marriage, born in 1834, entered into possession of the property. His right, however, was disputed by his uncle, Major-General Marcus Slade, fourth son of Sir John, and twin brother to Sir Frederick, and to try the right between the uncle and nephew this action of ejectment was brought by the former. It does not appear that the fact of Sir Frederick's marriage was ever formally communicated to his family, but it was known

that Barbara Maria Mostyn had been the reputed wife of M. Charles Von Kœrber, an Austrian engineer officer, who was alive at the date of her marriage with Sir Frederick ; and, in 1848, a correspondence on the subject took place between Sir Frederick and the present plaintiff. The defendant, Alfred Slade, however, grew from infancy to manhood in entire ignorance of the slur which was cast upon his birth, nor was it until some time after he came of age, and when he was about himself to be married, that he learned that his legitimacy was questioned by his uncle.

The sole question, then, which the Court of Exchequer had to try in this cause was, whether the defendant was or was not the legitimate son of Sir Frederick Slade ; which question depended upon whether the marriage of Sir Frederick was or was not a valid marriage ; and this again upon the further question whether Lady Slade was or was not, at the time of her second marriage, the lawful wife of M. C. Von Kœrber.

The common law courts of this country have always treated the legitimacy of children with great tenderness ; and, where an ostensible status of marriage has existed between the parents, required strong proof that no real marriage was contracted, before they would allow the issue to be bastardised ; and this is commonly expressed in the legal phrase, that there is a strong presumption in favour of marriage. The peculiarity of the present cause was, that this maxim was prayed in aid of the evidence in favour of the *first* marriage of Lady Slade, which took place at Milan in the Austrian dominions, in order to effect, on behalf of a stranger to both marriages, the illegitimation of the children of the second marriage, which was solemnised in England. It was conceded by the Solicitor-General, in his argument for the plaintiff, that no complete proof had been adduced that the forms required by Austrian law had been observed in the contraction of the marriage ; but he contended, that the proof offered, coupled with the presumptions to which it gave rise, was sufficient to establish the fact ; it being the duty of the court to make every presumption in favour of

marriage, in compliance with the above stated maxim of law. The contention on the other side was, that except where the interests of the children of a marriage are affected, there is no reason why the law should facilitate the proof of marriage rather than of any other contract; but that, on the contrary, where a marriage is alleged under circumstances which imply crime in one of the parents, and render the issue of the subsequent marriage of that parent illegitimate, the strictest proof is demanded which the nature of the case will admit of. That such is the policy of our law may be gathered from the conflicts which existed formerly between the common law and ecclesiastical courts on the subject of incestuous marriages. The question in those cases was, not about the forms and ceremonies of the contract, but about the capacity of the parties to contract marriage, which was claimed as a matter of spiritual cognizance. The ecclesiastical courts annulled marriages which violated their own canons of prohibited degrees, and the common law courts were bound to respect the decrees so given; but in cases where no decree had been pronounced, and the legitimacy of the children was questioned on the ground that the marriage was against the canons of the Church only, the common law courts would not allow the question to be raised at all, and even prohibited the ecclesiastical courts from entertaining it after the death of one of the parties to the marriage—that is, at a time when the question could only be raised for the purpose of affecting the status of the issue. Hence arose the distinction between *void* and *voidable* marriages, terms which never implied any real difference in law between one species of marriage and another, but simply expressed the practical consequence of a conflict of jurisdictions; the one solicitous to prevent unlawful matrimony, and the other to protect the legitimacy of children, the born of such a marriage. It would have been no very violent extension of the principle, if, in favour of the issue of a second though bigamous marriage—*there being none of the first*—the courts had refused to take notice of the existence of the first marriage, after both mar-

riages had been dissolved by the death of the parties; and the reason of the rule in the case of incestuous marriages would have justified this extension, viz., the difficulty in which the children were placed after the death of their parents, and by the lapse of time, in proving the true circumstances of the case. But the common law—equally with the canon law—held bigamy to be not only unlawful but criminal, and where the crime was proved, bastardized the issue of the bigamous marriage—but in consistency with its own principle of protecting the issue when possible, it requires that the most conclusive proof should be given of that which is to operate so injuriously on those interests which it is pledged to protect. In the case before us grave doubts—to say the least—existed, whether the essential formalities required by Austrian law for the validity of marriage had been complied with, and it seems only the natural application of the presumption in favour of legitimacy, that the plaintiff should be required to clear up those doubts, refusing to him the aid of those presumptions which were devised in the interest of children, and placing him in the same, and no worse position, than he would occupy in the proof of any other contract between third parties upon which his rights of property incidentally rested. That this question should not have been raised before, will not appear so extraordinary as it otherwise might, when it is recollected, that it is in fact only in cases where the children have been insisting on their legitimacy that the presumption in favour of marriage has been established as a principle of law. No case was quoted by the Solicitor-General in support of his contention except *Piers and Piers*, in which the issue of the marriage were the plaintiffs in the suit, and we believe that there is no case in point to be found. In the ordinary cases, where a marriage is set up by, or against, third parties, viz., in the prosecution for bigamy, and in the now abolished action for criminal conversation, it is admitted that strict proof of a valid marriage is necessary. In the one case the Crown, a stranger, sets up the first marriage against the husband; and in



the other case the husband sets up his own marriage against a stranger to it. Why then should a different rule prevail in the action of ejectment, where a marriage is set up by a third party, which if valid would imply bigamy in one person, criminal conversation in another, and bastardise a third. Yet such is the law, according to Baron Bramwell, who, while he gave his judgment for the plaintiff, at the same time considered it—

“Objectionable that a judge and jury should try a man for bigamy at the assizes, and that the judge should have to say to the jury that there was no sufficient evidence of the first marriage for the jury to find it and so convict, and that they should then try an ejectment by issue of the marriage, and on the same evidence the judge should have to tell the jury there was sufficient evidence for them to find the marriage.”

Surely if the decision in *Piers* and *Piers* is properly understood and applied, that “objectionable” practice would be wrong practice. The Chief Baron gave a modified assent to the defendants view, but the conclusion at which he arrived on the facts in evidence was based upon the same hypothesis as that of Baron Bramwell. Assuming that the onus of shewing the first marriage to be invalid rested on the defendant, he considered that full clear and satisfactory proof had been adduced to show that marriage to be invalid, so as to satisfy the rule laid down in *Piers* and *Piers*. Baron Martin was of this opinion also. Baron Bramwell on the other hand, giving it as his opinion that the question should be tried, as if a relative of Sir Frederick Slade, intending to benefit his legitimate children, had made the enquiry; or as if there had been children of the first marriage, whose status was in question; or as if Sir Frederick had been sued for necessities supplied to his wife; yet for convenience treating it in the alternative as if it were for the plaintiff to shew the validity of the first marriage, declared that in his opinion all the facts were satisfactorily proved which were necessary to be proved in order to render marriage valid by Austrian law. It is more difficult to

understand Baron Pigott's reasons, or how he reconciles the conclusion to which he came with the principles which he invokes as his guide. He sets out by saying, "that the plaintiff must make out the defendant's mother to be the wife of Von Kœrber by a valid marriage . . . by legal and satisfactory evidence such as brings conviction to the mind," that is, we presume, by somewhat more evidence than would be necessary in case Von Kœrber had been sued for necessities supplied to his wife, but somewhat less than would be necessary in a prosecution for bigamy, or than the rule in *Piers* and *Piers* demands, if that rule be applicable to the first marriage alone: but in the conclusion of his judgment he says, "that he has not been able to regard the question which has arisen in a different light from what he must have done had there been issue of the Von Kœrber marriage, and they were called upon to determine upon the same evidence whether that issue had legitimate," in other words, that he has, in the consideration of the evidence, been guided to his conclusion by the strong presumption in favor of the issue, which requires most satisfactory proof of the invalidity before the marriage be treated as invalid; nevertheless he had before stated—

"That it was difficult to understand how the doctrine of presumption in favour of marriage could be applied to this case to supply the want of proof of any necessary fact; . . . because it would clash with the presumption in favour of the first marriage, and further would involve a presumption against innocence and against legitimacy of children."

He then goes on to say—

"That the case in his view involves not so much the doctrine of presumption as a question of sufficiency of evidence, how far it is necessary to carry indirect proofs to establish facts which are supposed to have happened forty years ago."

But, if the reasons assigned by the great lawyers who decided the case of *Piers* and *Piers* are to carry any weight at all, nothing can be clearer than that the difficulty under

which Baron Pigott labours, "how far it is necessary to carry indirect proofs," was intended to be removed by the presumption of fact which, in compliance with the rule in that case, he was bound to make—the House of Lords there presumed a special license, without which the marriage was absolutely void, although there was no evidence whatever that such license had been issued, and very strong but not conclusive evidence that it never had been obtained—and why did they make this presumption? Because otherwise they might be declaring, in the language of Lord Campbell, at the suggestion of a stranger to the marriage, "the wife to be a concubine and the children bastards upon mere speculation." And so in this case, unless the court presumed the first marriage set up by a stranger to be invalid, until its validity was conclusively established, which is the logical consequence of their presuming the second marriage set up by the children to be valid until its invalidity is conclusively shown, they would be declaring the defendant a bastard and his mother a concubine upon mere speculation, at the instance of a stranger to both marriages. The quantum of evidence then required is exactly meted out on the authority of the House of Lords; and if the plaintiff in this case did not provide a sufficiency of evidence, owing to the death of those who could have satisfactorily explained the difficulties which presented themselves, he was only in that very predicament which the policy of the law designed to place him, when he undertook to bastardise the defendant by a reference to facts which occurred forty years ago, to substantiate which was *his* business, and not to destroy them that of the defendant. To treat the plaintiff in this case as if he were the issue of the first marriage, is therefore either going too far, or not far enough.

In *Standen and Standen* (Peake 32), an issue was directed by Lord Thurlow, to try who were "the legitimate children" of a man who had repudiated his reputed wife on the ground that the marriage was contracted without publication of banns, and had married again. The children of the first marriage were

made plaintiffs, and of the second marriage defendants. The judge directed the jury to find for the plaintiffs, unless the non-publication of banns was proved, which not being done, owing to the death or absence of witnesses, the verdict was given for the plaintiffs. Lord Thurlow was dissatisfied with the verdict, having strong secondary evidence for believing that the banns had never in fact been published, and that the property in dispute was really intended for the children of the second marriage, and a new trial was directed; but the result was the same. This case, which is in entire consistency with the rule in *Piers and Piers*, establishes that, if the plaintiff in *Slade and Slade* had been the issue of the first marriage, he was entitled to far more consideration than was accorded to him even by Baron Bramwell, but, not being such issue, he received more than he was entitled to at the hands of the Chief Baron. It may be objected that this view of the law might lead to a different conclusion being drawn from the same evidence, according as the parties before the court were different; that, on the same evidence, Sir Alfred Slade, might be pronounced legitimate, which would legitimatise the children of Von Körber, if before the court. It may be answered, however, that, in the first place, there are many other cases in which the same apparent anomaly exists. In a case, notorious not many years ago, it was found impossible to induce a jury to set aside a conveyance, on the ground of forgery, as against a *bonâ fide* purchaser of property, although no one, outside the jury box and uninfluenced by these presumptions which in the box they were bound to make, doubted that forgery had been committed, of which the forger had been convicted on his own confession. But, in the second place, it is most unfair to assume that the contest could have arisen in the same way between the issue of the two marriages; or that, if there had been issue of the first marriage any contest would have been possible. It does not follow that in such case the first marriage would have been solemnly repudiated by the mother, nor that Sir Frederick Slade would have neglected to seek

that protection from the Austrian courts, which he was not bound by English law to resort to when providing for his children's legitimacy against the attacks of those who had no interest in the marriage set up, and who were using it merely as an engine of offence to destroy a status, otherwise incontestable, and alienate from the son the inheritance of his father. We cannot but think that the interests of the law, as well as those of the defendant, are best served by the accident which imposes on Baron Pigott the necessity of withdrawing his opinion, and thus allowing the judgment of the court to be given for the defendant.

There was a further contention on the part of the plaintiff, which opens a more important field of discussion on the general principles upon which the law of marriage rests; but in favour of this contention the plaintiff could only obtain the single support of Baron Bramwell. It was contended that a marriage in Austria is never *ipso facto* invalid, but subsists as a marriage by consent and co-habitation, until pronounced invalid by the competent Austrian court; that Lady Slade, having contracted such a marriage, was bound by that law, and that although her marriage might have been declared void, she was still incapable of entering into a fresh contract, and liable to be convicted of bigamy in this country until she had obtained a formal declaration of invalidity from an Austrian court. It is obvious that two questions here present themselves. First, is this the law of Austria? and secondly, if it is so, does this law attach in this way an incident to the marriage contract which can be recognised and enforced in the courts of this country? The first question was answered in the negative by the Chief Baron, who held, upon the evidence, that such was not the law of Austria; that a position so strange could not be established by mere inference from a comparison of the effect of the different sections of the code, in opposition to the language employed, and would require a more distinct and definite assertion by the legislative authority of that country, before it could be accepted here as the law of Austria. In this view Baron Martin con-

curred, and Baron Pigott stated that he would hesitate long before he differed from it. Baron Bramwell, however, accepted in its entirety the argument of the plaintiff's counsel, and in so doing had to grapple with the second question, on which the Chief Baron had very slightly touched. In his answer he seems to us entirely to misapprehend and utterly to confound all the notions entertained by our jurists of the province of legislation in the matter of marriage. Lord Stowell, an authority not inferior to Baron Bramwell on any subject, but especially on this, lays it down, in the well known case of *Lindo* and *Belisaria*, that marriage is a contract according to the law of nature, adopted by civilised nations, which have, each within its respective jurisdiction, enacted those forms and ceremonies which shall be necessary to make the contract binding. Where the legislation of a separate country has attached no forms to the contract, then it is complete by that which is the essence of marriage everywhere—the consent of the parties themselves. But where such forms have been declared necessary to the validity of the contract, without them, no binding contract has been entered into at all. And it is the duty of a foreign court, where a question of the validity of marriage arises, to enquire, first, what the law of the country in which the marriage was contracted does require; and, secondly, whether those requirements have been satisfied. “But,” says Baron Bramwell, “a foreign law may require marriage to be performed in a particular way, and may be only directory,” in other words, it may prescribe forms and ceremonies, but may enact that they shall not be necessary for the validity of the contract; a position which is incontrovertible since it leaves marriage, as the law of nature created it, to consist in nothing but consent and cohabitation. But he goes on to say, “or, it may prescribe certain conditions without which the marriage would be voidable, voidable by certain proceedings at the instance of certain persons, and if taken in a certain way and time.” We take the liberty of saying that it can do no such thing, without contradicting the fundamental notions,

upon which our ideas of marriage rest, and upon which the marriage contracts of one country, whether civilised or uncivilised, are accepted in another; for a marriage, where the conditions of the contract are not certain, is no marriage at all, at least beyond the limits of the country where such a law prevails. We have before adverted to the mode in which the distinction between void and voidable marriages came to be made, and we recur to it here for the purpose of pointing out, that the term "voidable" was never applied to the conditions of the contract, but only to the permanence of the status of marriage and the capacity of certain parties to enter it. The passage from Lord Coke, relied on by the solicitor-general, proves nothing on the point. "This Act," says Lord Coke, "extendeth to a marriage *de facto* or voydable by reason of pre-contract or of consanguinity or the like," that is, it extends to a marriage, in which the marriage contract has been *de facto* according to law entered into by the parties, although such contract is liable to be declared null on account of some personal disabilities under which one or other of the parties laboured. Suits in the ecclesiastical courts to annul marriages on such grounds were in the nature of divorce. In all other suits for nullity of contract on account of defects in the contract itself, the marriage was *ipso facto* void, and the suit was instituted merely for the purpose of establishing this fact for ever. In all questions concerning marriage, it is necessary to keep distinct our ideas of it regarded as a contract or as a status; and to observe, that the laws of different countries which affect the capacity to marry and the status of marriage attained by a valid contract, are of municipal obligation alone; whilst those which affect the conditions of the contract are by the international law of Europe binding and cognizable everywhere. It is clear that the incapacity which our Royal Marriage Act creates, would not hinder a marriage being contracted in foreign countries, which would be deemed valid everywhere but here, the proper forms being followed in the completion of the marriage. And it is equally clear that, if

an Austrian ecclesiastic were to become domiciled in this country, and contracted marriage with an English woman in due form, such marriage would be held valid here, notwithstanding that the Austrian code absolutely incapacitated him from marriage at all. And so it is with regard to those incidents which the law of any particular country may attach to the marriage status. Sir James Wilde refused to recognise as a marriage at all, a status which admitted of polygamy, and was thus opposed to those fundamental principles of marriage, which are acknowledged in all Christian states, and form the basis of their legislation on the subject. The law of Austria may, within the limits of its own jurisdiction, give to what is called in the 93rd section of the code, "The Nuptial Union," that is, a marriage liable to be declared, but not yet declared, an invalid contract, the same effect as it gives to what is termed in the 111th section, "the tie of a valid marriage." But such legislation cannot be recognised in this country, which, especially with respect to one of its own subjects, knows of no marriage status, but that which is founded on a perfect contract. It is the vice of the Austrian code, that it appears to regard marriage as an institution which owes its first existence to Austrian legislation alone. This code professes to define the objects of marriage, to limit the capacity to contract, to lay down the conditions of the contract, and to deal with the status, as if the matter were one in which no other nation could have any concern; and thus regarding marriage as drawing nothing from the law of nature or of Christendom, and all from its own provisions; it confounds together that which a foreign state can accept and must inquire into, as the express condition of a valid marriage, and that which it may reject as inconsistent with law, which it is not within the competence of any particular country to change. Whether the distinction can in all cases be satisfactorily made, it is not our business to inquire. The skilled witnesses for the plaintiff seemed quite unaware that the question was one of international significance. The witnesses examined by the



defendant took a wider range, and, anxious perhaps for the credit of their country's laws, endeavoured to point out, amidst the apparent confusion, what is and what is not of municipal obligation in the code, but they failed to make any impression on Baron Bramwell.

We do not wish to be understood as condemning the Austrian code as a bad marriage law. It may be that it works well in practice in Austria, and that, as Dr. Keller observed, the strictness with which the conditions of the marriage contract are laid down, is modified in effect by the strictness of the provisions by which the non-compliance with those conditions are tried. But, unfortunately, while foreign courts are bound to examine the conditions of marriage prescribed by the law of Austria, they cannot, as the Chief Baron pointed out, remit their suitors to the courts of Austria. Nor would it be desirable that they should do so, if the Austrian courts deserve the caustic judgment which Baron Bramwell passed on that which decided the Colloredo case, to which at the same time he pronounced Sir Frederick Slade ought to have gone, though all the evidence in the cause showed that, if the defendant might, Sir Frederick Slade could not by any possibility go.

Bigamy, by the law of England, is the marrying again after once contracting a marriage, valid so far as the contract itself is concerned. Whereas by the law of Austria the crime may be committed although the first marriage is liable to be declared, and should be afterwards declared, no marriage contract. It nowhere, however, appears that in Austria a second contract of marriage is invalid, as soon as it is made plain by judicial declaration that the first was not a valid contract. Although, then, Lady Slade might, in Austria, have been amenable to the law of bigamy had she married again in that country, notwithstanding the invalidity of her first marriage, she could not have been made so here, unless it be conceded that it is competent to Austrian legislation to establish the status of marriage on an invalid contract;

to lay down that consent and cohabitation shall constitute the essence of the perfect contract (which, when perfect, is by the universal law of Christendom indissoluble save by death or divorce), and yet that an Austrian court, and that alone, may act on a different principle, and holding that consent and cohabitation are not sufficient without the addition of prescribed forms and ceremonies to constitute the perfect contract, may declare even after the death of the parties that a legal contract never existed at all. In such case, says Baron Bramwell, the marriage is valid everywhere, at least here, until the declaration of nullity has been made by the court of the country which has reserved to itself the right of so declaring it, because "otherwise the consequence would follow that in the country where the marriage took place, the prescribed proceedings for a declaration of nullity not having been made, the marriage would be good and valid, whereas, out of that country it might be held invalid." But the consequence does not follow that a marriage in the country where it took place would be held good and valid *because* the prescribed proceeding has not taken place, but only *until* it takes place, provision being here made for the enquiry, even though it takes place in the very middle of another cause, whereas out of the country it would be held valid for ever, because no means would exist for instituting the prescribed enquiry. The converse of this case presents the more inconvenient consequences, since a marriage might be held good and valid in every country in Europe, which yet in Austria might be declared no marriage at all. To illustrate the absurdity of the position, it is only necessary to suppose what might have happened in this very case. Von Körber might have come to England, recovered heavy damages against Sir Frederick Slade for criminal conversation, and returned to his own country to find his marriage declared invalid, the validity of which constituted his sole claim to the damages he had received from an English jury. On this question of marriage, which is of universal interest and jurisdiction, no one country can

reserve to itself, to the exclusion of all other jurisdictions, the right of determining whether the contract of marriage has or has not been entered into; nor can a different rule be applied to the marriage contract from that which holds good of all foreign contracts, as to which the courts of the country, where the contract is sought to be enforced, do take upon themselves of necessity to judge whether they have been validly entered into or not, although the law by which they judge is the law of the place where the contract was entered into; and no regulation made by a foreign government can oust them of their jurisdiction. The status which rests upon an invalid contract is no marriage status at all; and cannot be deemed such here, because, in the country where the parties are domiciled, they are restrained from treating it as null until the nullity of the contract has been decreed in a particular form. There is no law in England which restrains an English subject, who has unhappily placed herself by a foreign ceremony of marriage in such a position, from repudiating the status so imputed to her, and marrying again in this country. The *vinculum fidei* of marriage, the relation of husband and wife never in law existed; and it is possible that a second marriage may have been entered into "with the full intent," to use Baron Parkes' language in *Catherwood v. Caston* (13, M. & W., 265), "of putting an end to the invalid and void contract into which she might have entered." For if the first were valid and binding it could only be determined by death or divorce.

It will not be possible, within the limits of an ordinary article, to give more than a cursory view of the evidence upon which the court were called upon, as jurymen, to say whether a legal marriage at Milan had been contracted or not. It was proved beyond dispute, that a ceremony of marriage was solemnised between Miss Mostyn and M. C. Von Kœrber in 1825, at the Church of St. Fidèle in Milan; that the parties cohabited together for some months, and then separated, under the sanction of the proper judicial tribunal at Vienna. But the validity of this ceremony was contested on

two grounds : First, that the priest before whom the ceremony took place, was not the proper priest who ought to have officiated ; and secondly, that the banns of the marriage had not been duly, or at all published. With regard to the first objection, which was one entirely of law, that is of Austrian law, Baron Martin gave no opinion, and the Chief Baron concurred with Barons Bramwell and Pigott in holding that the objection failed. The difficulty consisted in this, that the Austrian code required that the solemn declaration of consent should be made before the “ordinary *curator animarum*” of one or other of the contracting parties, and where the marriage was a mixed one, before “the catholic *parochus*.” Now Von Kerber was an officer of engineers and a protestant, and Miss Mostyn was a catholic. The proper *curator animarum* of the bride was, without doubt, the priest of the parish in which she resided ; but the skilled witnesses were at direct variance, as to who was the proper *curator animarum* of a protestant officer belonging to a corps to which no protestant chaplain was appointed. The code was silent on the subject. On the part of the plaintiff it was said, that by the peculiar constitution of the Austrian army, the whole body, no matter to what form of religion the soldier might belong, was subject to the ecclesiastical jurisdiction of the catholic feld bishop, feld superiors, and feld chaplains ; whereas, according to the defendant’s witnesses a catholic priest could never, by the fundamental principles of Austrian law, be the *curator animarum* of a protestant. The priest who performed the ceremony in this instance, was the feld superior of the district in which Von Kerber was stationed, and had the latter been a catholic, would undoubtedly have been his proper priest, the engineer corps being subject to his jurisdiction. But Von Kerber was a protestant, and if the feld superior was not his *curator animarum*, he had none at all.

“I have certainly,” said the Chief Baron, “felt great difficulty in arriving at the conclusion that a Roman catholic can, under any circumstances, be the *curator animarum* of a protestant, but the

evidence of Turinsky, himself a feld superior, with his actual experience of many years in discharging the duties and exercising the functions of his office, together with the express authority of Leonhard, and the language of the apostolic feld vicariate, seem to me to shew that such has been unquestionably the usage in Austria in relation to marriages of men in the military service, for a great length of time, and this, if insufficient to outweigh it, at least throws much doubt on the evidence to the contrary on the part of the defendant's witnesses, so that I think this is a point falling within the presumption of law, arising after a long lapse of time in favor of any marriage that all that has been done, has been rightly done."

Upon this we may remark that it is hardly consistent with the reasons given in the case of *Piers* and *Piers*, where great stress was laid upon the circumstance that the jurisdiction of the priest was shown to be unquestionable, before the maxim "*omnia rite acta*" was applied to his acts; and secondly, that an Austrian court having had in the last century to inform itself on the law of England, might on the same principle have held that general warrants were legal, which Lord Camden and the Court of Common Pleas held afterwards to be unconstitutional and illegal, since the usage of a feld bishop and feld superior can hardly be placed on a higher level, as evidence of law, than that of a Secretary and Under-Secretary of State in England.

The other objection was the one upon which the court were divided. The Chief Baron and Baron Martin arriving at the conclusion, that no banns had been published for the bride according to the directions of the code, and that this defect was fatal to the validity of the marriage. Barons Bramwell and Pigott, on the other hand, deeming that sufficient evidence existed, from whence to infer the regular publication, and that the evidence to the contrary was not satisfactory or reliable. Baron Bramwell held further, as we have before stated, that the defect, if established in fact, would not be fatal to the validity of the marriage, until a declaration of invalidity had been pronounced by the competent court in Austria. On one point

in dispute, and one point only, the whole court were agreed; viz., that according to the Austrian code, it was requisite that before any publication at all could be made, the parties must have resided for six weeks in their respective parishes. If Lady Slade's evidence was to be relied upon, no sufficient residence did take place in the only parish where alone it was possible her banns could have been published; but the light in which the rest of the evidence was viewed by the Chief Baron and Baron Martin rendered it unnecessary that their conclusion should be based upon the accuracy of her recollection at all, singularly corroborated as it was by the sequence of events which the documents testified to. The evidence from which it was sought to be inferred that due publication had been made, consisted of two registers, in which the marriage was recorded; one kept by the feld superior of the district, who produced it, together with the marriage documents, which the law required should be preserved as the vouchers of the regularity of the proceedings; the other a duplicate register deposited in the proper custody at Vienna. In neither register was any mention made that the banns of the bride had been published by her parochus, although publication of one and dispensation from two callings for the bridegroom were duly entered. But amongst the marriage documents were found two, from whence it was said that this publication was sufficiently to be inferred. The first was a request from her parochus to the military chaplain to publish banns for the bridegroom, on a printed form in which the publications when made might be entered. This form was not filled up, and was not, therefore, returned to the parochus of the bride, who for some reason, and if Lady Slade's evidence could be trusted, for the reason presently mentioned, did not perform the ceremony. The other was a document called in German "*entlassung*," and in Latin "*dimissio*," respecting the true nature of which the principal controversy existed. It was signed by the parochus of the bride, and contained a statement that she was hindered by no impediment, civil or canonical, from contracting the impending marriage, and as non-

publication of banns was a civil impediment, it was sought to be inferred that banns must have been published. The reasons against such conclusion were, in the opinion of the Lord Chief Baron, "strong, distinct, and satisfactory." In the first place, there was not found the usual certificate of publication; there was no entry in either register of the fact, where it ought to have been entered; the time which had elapsed from the receipt of the bridegroom's permission from the military authorities to marry, was not sufficient to admit of a complete publication, and it was in the highest degree improbable that the publication of banns would commence before the permission arrived, which it was not a matter of course would have been granted at all; and lastly, there were the proved facts, that the ecclesiastical duty of the civil parochus forbade him to assist in, or to publish the banns of, a mixed marriage; that the government did not compel the civil priests in Lombardy to forward marriages which were forbidden by the church, although permitted by the state; and that there was no recorded instance of any such mixed marriage having been celebrated in Milan, or the whole of Lombardy, at that period of time.

"Upon the whole of the evidence, and upon these authorities," said the Chief Baron, "and having long and anxiously considered this part of the case with the deepest attention, I am impressed with the profound conviction that no catholic priest of Lombardy would, at this period, have published the banns or performed the ceremony of a mixed marriage in any church within the archbishopric of Milan, and that the Priest Zerbi never did in fact publish the banns within his parish."

Absolute certainty can seldom be attained in human investigations into past events. That relative certainty which is substituted for it, to the end that controversies may be determined otherwise incapable of determination at all, must be arrived at on some principle, according to which facts are assumed as true of which no evidence is given, or positive

evidence is required of facts before they are believed as true ; and this assumption is made upon some principle of necessity or convenience, and with reference to the character and importance of the rights involved in the dispute, and the position of the parties who are before the court. In the case before us, the death of the only witness who could have given absolute assurance whether the banns of the marriage had been called or not, rendered it necessary that something must be assumed, before an affirmative conclusion could be arrived at. On what principle, then, can the assumption be made? It is impossible to read the exhaustive judgment of the Chief Baron without being as profoundly impressed as he was with the great improbability of the fact to be proved and the notable defects in the proof relied on. It is equally impossible to read Barons Bramwell and Pigott's judgments, without perceiving that enough was proved to justify a jury in assuming enough to uphold the marriage, if it ought to be upheld upon any principle of practical convenience, or with a view to the assertion of any just right. But apart from the bare legal merits of the case, there is no just right by which the plaintiff can claim the position and property, which, in the natural course, would descend to the child of his brother ; and to assume that a general presumption exists in favour of the validity of marriage, however it may be dragged into a dispute, on the ground that the interests of children may otherwise be affected, is, when the marriage is set up for the express purpose of defeating those very interests, to lean on the shadow when the substance is gone.

NOTE.—Since the above was written we learn that the cause has been settled by an amicable arrangement between the parties.

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## ART. VII.—COUNTY COURT AMENDMENT.

**A**T the present time there is a fair promise of important change in the law and in its administration; there is a bounteous blossom, will there be any fruit?

The attention of the public is, we think, scarcely aroused to the magnitude of the intended changes—probably there is ample reason for this—the Reform Bill has occupied so much public attention that many have either forgotten the subject of law reform altogether, or at all events feel assured that the session will not suffice for the carrying out of the various measures now before Parliament.

When we consider the hostility that has already been shown to the several measures introduced by the Lord Chancellor, and the criticism with which the Bill giving the County Courts a £500 jurisdiction in Admiralty matters, and now before the Lower House, has been received, we cannot altogether regret the fact that the Reform Bill has blocked the way, for the reason that as little or nothing can or will be done in the present year in the way of clearing the superior courts of the work which chokes them, probably a reformed parliament may think that one of the tasks worthy their steel or *broom*, would be to clear out the Augean stable of the law, and probably we shall at last find the subject dealt with in a worthy and becoming manner. Are the vast aisles and halls of that palace, to be reared at such enormous cost, destined to ring not only with the tramp of the suitors but to echo with the curses “not loud but deep” of angry and disappointed litigants whose causes won’t be on for months, whose special jurors won’t attend, fine them though you do, or may we hope that in the year of grace 1877 something really useful may be done, or at all events attempted, so that suitors may at last have the justice?

Passing by the Judges’ Chambers, and Office of Judge in

the Admiralty, Divorce, and Probate Courts Bills, the former of these probably as bad a measure in every shape or way as ever passed the Lords, and if passed in the Commons, passed in the teeth of the profession, the latter so palpably a political measure that the less said about it in a law publication the better, we come to the Lord Chancellor's Bill, intituled, "An Act to amend the Acts relating to the jurisdiction of the County Courts," and to the Bill conferring upon the County Courts a jurisdiction in Admiralty matters to the extent of £500.

At the time of our writing, the first has already passed the House of Lords, the other remains in the House of Commons.

We purposely abstain from discussing the Bankruptcy Bill, as there can be but little doubt but that this measure cannot become law this session, and it would be idle to anticipate the objections made to it, and the discussion which of course a measure of such enormous importance must undergo.

But to our subject, and one word as to the original jurisdiction of the County Court, and for our purpose we need only travel back to the years 1846-47, when the New County Courts sprang into existence.

The jurisdiction of the County Courts originally, *i. e.* under 9 & 10 Vict. cap. 95, sec. 58, was in the words of the section over all "pleas of personal actions, where the debt or damage claimed, is not more than £20 whether on balance of account or otherwise. . . . Provided always that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage." They may now entertain suits for the recovery of all debts and demands, including legacies and balances of partnership accounts, where the sum sued for does not exceed £50 (by 13 and 14 Vict., c. 61, s. 1), but have no jurisdiction as yet, unless

the parties previously consent in writing, (for jurisdiction by consent, *see* 19, 20, Vict., c. 108, s. 23), in any action in which the plaintiff claims a larger sum than £50, or the title to property or the validity of any devise or bequest, under a will or settlement may come in question.

Actions for malicious prosecution, for libel or slander, or the seduction of a daughter, are still beyond their cognizance, the *questions of law* being often difficult.

We wonder if that was really the reason why the legislature, some twenty years, thought that actions such as these should be tried in the superior courts, when, in 1867, many members of that august assembly, see no, or at all events, very little objection to giving these same County Courts a £500 jurisdiction in Admiralty matters and in all maritime contracts, matters oftentimes of the greatest importance and difficulty.

For the benefit of the subject, the Crown has been enabled to sue in this court, (instead of the Exchequer), for customs' duties or penalties, when the amount does not exceed £100, and for succession duties, when the amount does not exceed £50, the decision of the judge being in all such cases final.

We thus see that the present jurisdiction of the County Court is of a somewhat exceptional and extraordinary character. That which relates to the recovery of debts and the possession of property is properly within the province of the courts of common law. Suits for custom or succession duties are in strictness cognizable only in the Exchequer. The probate of wills and the grant of administrations were the privileges of the Courts Christian from the time of the Conquerors, till transferred only recently to the Crown, while suits for legacies, questions of partnership, and the regulation of charities, constitute a large portion of the business of the Court of Chancery.\*

The present Bill is a remedial Act, and so far as we can see does not in reality confer any further or larger jurisdiction

\* *See* Pollock and Nichol's C.C. Practice p. 1-11. Blackstone's Commentaries, 3rd Ed., pp. 37, 38, 39, *et. sep.*, as to the odds and ends jurisdiction which various Acts confer upon the County Courts.

upon those courts than they already possess except under sections 11 and 12, but it professes to deal with and to amend the powers of the County Court in a way that fairly challenges criticism.\*

The 1st section confers a breadth of jurisdiction, which probably may be found advantageous; under that a plaintiff may be entered in the County Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered by leave of the judge or registrar of the County Court within the district of which the defendant or one of the defendants dwelt or carried on business at any time, within six calendar months next, before the time of action or suit brought, *or with the like leave in the County Court in the district of which the cause of action or suit wholly or in part arose.*

According to the law of Scotland, when the plaintiff appears and the debtor does not, the law assumes that he has no defence, and without entering upon the case at all, decree in absence is at once pronounced.

The Lord Chancellor, we imagine, desires to introduce this common sense provision into the law of England. For *inter alia* by clause 2 :—

“In any action brought in a County Court for the price or value of goods or chattels *sold and delivered to the defendant*, to be dealt with in the way of his trade, profession, or calling, the plaintiff, &c., &c., may issue summons, and if defendant shall not give notice of intention to defend, judgment may be entered up, without plaintiff giving any proof of his claim upon proof by affidavit of the service of the summons.”

A little examination will, we think, show that this clause is environed with difficulty, the suitors “life and death, his bane and antidote,” are both before him.

In the first place this clause applies only where the action

\* By section 11 actions of ejectment may be brought where annual value of property does not exceed £20, and by section 12 these courts may try cases where title comes in question.

is brought to recover the price or value of *goods sold and delivered*, words which not only have a technical meaning, but are words of strict limitation; matters lying there *in contract* are we submit clearly without the clause; but these words of limitation are themselves still further limited, for the goods sold and delivered must be *goods sold and delivered to the defendant, to be dealt with in the way of his trade, profession, or calling*.

What construction will be put on these words, "dealt with in the way of his trade," we will not venture to conjecture, but it appears clear that the clause is wholly inoperative in many, if not most, of the daily transactions of life. Goods sold and delivered to a man, say leather to a bootmaker, *might* be within the clause, food and provisions, meat and drink, are not.

There may be some deep and subtle wisdom we cannot see concealed in the bosom of the clause. We confess we fail to see it, and surely a Bill intended to apply to the poor man's court, and brought forward for the express purpose of cheapening his mode of redress, should be clear and patent as the sun at noonday, a clause such as this is full of difficulty.

Now as to clause 7. In any action of contract, where the claim on the writ does not exceed £50, or where such claim, though it originally exceeded £50, is reduced by payment, an admitted set off or otherwise, the defendant may, within eight days from the date of service, apply to a judge at chambers for a summons to show cause why the case should not be tried in the County Court, and on the hearing of such summons, the judge *shall*, unless there be good cause to the contrary, order such action to be tried accordingly.

We suppose the intention of the Lord Chancellor is to prevent any action being brought in the superior courts of England for less than £50, but it seems an anomaly, first to allow a plaintiff to issue a writ for a claim not exceeding £50, and then to call upon him to show cause why the case should not be tried in the County Court! It appears to us that this is a very roundabout, not to say stupid, way of effecting what we

presume is the Lord Chancellor's object. The only possible way of attaining the object which he has in view, is either by a positive enactment, declaring that no writ of summons for less than £50 shall issue from any superior court of law in England on any pretence whatever; or, as we have before urged, to make the County Court the court of first instance in all cases, the parties having the right to remove them into the superior courts, upon shewing cause, or upon security for costs being given. Again, this section applies only where the claim upon the writ does not exceed £50. Make the claim £50 10s., or £51, and the clause and the objects intended to be effected by it vanish and melt "into air, into thin air."

The scheme and the wording of this clause are alike clumsy. Either of the plans we have proposed is better than the one in the Bill now before us; and further, although it is an ungracious thing to say still say it we must, that it is exceedingly undesirable to trust to the discretion of any judge or judicial officer in matters of this kind.

We may say that the present Bill, however, has one virtue, one we can hardly praise too much, and that virtue is, that the Bill (clause 15) deals to some extent with the matter of costs. Upon that wheel, whatever may be said, the whole legal machinery revolves, and a fairly liberal scale of professional charges in the County Courts, would, we are convinced, save some thousands and tens of thousands of pounds to litigants, and do wonders in clearing the superior courts.

But the County Court is made to feel, under the present Bill, that it is but a drudge, an *inferior* court after all, and if it can be so made, is to be made, the scavenger of Westminster Hall, and the Assizes.

The County Court is to have the honour of trying such action *for malicious prosecution*, as may be remitted from the superior court, and this distinction is to be somewhat remarkably won. For by clause 10, it shall be lawful for any person, against whom an action for malicious prosecution, illegal arrest, illegal

distress, &c. &c.,\* or other action of tort, may be brought in a superior court to make an affidavit that the plaintiff has no *visible* means of paying the costs of the defendant, should a verdict be not found for the plaintiff, and thereupon a judge shall have certain powers to remit to a County Court the cause for trial.

Some meaning must be given to this loose and unlaywerlike phrase "*visible means.*" The owner of a house, a haystack, or a wheelbarrow, has *visible* means, in the sense that you can see that he has something, which, if sold will fetch something, though he may not have visible means of paying the costs of the defendant, while the owner of £100,000 in the funds has no *visible* means whatever.

There is much looseness in the phraseology of this Act, if the above may be an example, and the phrase to be "*dealt with in the way of his trade, profession, or calling.*" Clause 2 is another example of this. The words "*other action of tort,*" as used in this 10th clause will be productive of difficulty. Translating them by the great principle that their interpretation is to be *ejusdem generis* with the words before they seem practically inoperative; but as they must have some meaning and as an effect must be given *ut res magis valeat quam pereat*, the result will be that they will be extended (the Act having a broad interpretation), so that in any action of tort, no matter what the damages may be laid at, the County Court will have jurisdiction.

We cannot help saying that in our opinion the drafting of this Act is lamentably bad, evidently the work of one who is ignorant of that with which all lawyers are, or should be familiar, namely, the difficulty of interpretation.

Those familiar with the County Court and with the class of cases tried there will probably agree with us that the most

\* The words of the section are, "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort," &c., &c.

numerous, and certainly the most important in one aspect of the question, are the travelling drapers, and the beer-house cases for unpaid scores.

The first class, the travelling drapers' cases, is in no way dealt with under the present Bill. It would perhaps be impossible to deal with these cases without affecting, if not altering, that branch of the law of agency (husband and wife) to which they belong. The beer-house cases, however, are dealt with, and dealt with in a very astonishing manner.

Under the 4th clause, no action shall henceforth be brought or be maintainable in any court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, which after the commencement of this Act *was* consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied or of any security given for, in, or towards the obtaining of any such ale, porter, beer, cider, or perry.

Passing over the bad grammar (by the way there are two or three slips of this kind in the Act) we discover that instead of a beer-house clause intended to prevent the maintenance of trifling actions in the County Court for unpaid beer-house scores, we find a general enactment relating to the maintenance of such actions in any court, utterly irrespective of any limitation, and the policy of the Tippling Act,\* or rather of the 12th section thereof, and of which this may be termed a County Court imitation, reversed.

Under the 24 Geo. II., c. 40, commonly called the Tippling Act, by section 12 no action was maintainable for any sum for or on account of any spirituous liquors, unless such debt shall have really and *bona fide* been contracted at one time to the amount of twenty shillings or upwards, and (*inter alia*) where any retailer of spirituous liquors shall receive any pawn or pledge by way of security for payment of any sum owing for such spirituous liquors, every such person shall forfeit forty shillings,

\* The 24 Geo. II., c. 40, partly repealed by 25, 26 Vict., c. 38.



and the person pledging shall have the same remedy for recovering such pawn or the value thereof, as if it had never been pledged.

Under the Act of George II., against the innkeeper who supplied his spirits to some poor creature, who pledged for his glass of gin, his hat, cap, or pocket handkerchief, the pledgor had his remedy, but now under this 4th clause of the present Bill, no action is maintainable *in respect of any security given in respect of such ale, &c.*, in other words, the beer-house keeper gets paid, not in money, but in goods—the very opposite we believe to what is intended. Again, suppose a man stops at an hotel for a week or so, where he is well known, and upon leaving does not pay his bill, but the innkeeper lets it run on, as very often happens in the case of commercial travellers, is no action to be brought to recover the price of the ale, &c., &c. consumed during the commercial traveller's visit? certainly not says the clause.

We do not think this clause was ever intended to have the effect which, in point of legal construction it has; we do not always advocate the employment of lawyers in the preparation of Bills, but we do advocate the employment of men, who at all events can put into grammatical and clear English what they mean.

With the first—the beer-house score question—the present Bill, as we have already pointed out, alone deals, and, in our judgment, most unwisely: with that large class known by the name of the travelling draper cases, the present Bill in no way deals. The subject is one of the utmost difficulty we fully admit, and is in point of law a branch—and a very important one—of the general law of agency.

Now, it is a principle as old as the time of Fitzherbert, that whenever a wife's contract made during marriage binds the husband, it is upon the ground that she entered into it as his agent.

This sort of agency is implied from the circumstance of two persons living together as man and wife, and from this arises

the presumption that the wife has authority to bind the husband by her contracts for necessities suitable to his fortune and rank in life. This, however, must be when subject to two observations: (1) the contract must be for necessities; (2) that the party making it must not have been forbidden to trust her.

We know that strict proof is required by all the County Court judges as to these points, but we think that probably a way out of the great difficulty—which ever must arise upon the question of what is necessary and suitable to the degree and condition of a person in a very humble rank of life—may be found in the method of this particular dealing. By that we mean, that a very different principle might reasonably be applied to cases where the tradesman comes to the door, as it were by stealth, and solicits—almost begs—for custom, and allows a very easy method of payment for the goods supplied; for the ordinary rules of law apply only to ordinary transactions, and we submit that these transactions, in nine cases out of ten clandestine, are not ordinary so as to entitle them to the ordinary protection of the law.

So much misery is occasioned in the houses of the poor by the wife's purchasing some trifle for herself or her children, and sometimes the love of finery will carry away even the most thrifty wife, that it would be advisable (and we in no way desire to injure the tradesmen or throw upon him an unfair weight of proof), if some *express* authority from the husband should be insisted upon.

The subject is one of great difficulty, and we allude to it, not so much for the sake of expressing our own views upon the question as for the sake of calling further attention to it.

A few words in conclusion as to the County Court Admiralty Jurisdiction Bill, a measure which, whether it pass the legislature this session or no, is worthy of attentive consideration. We fancy that something of the old feudal spirit, the reverence for land, is still abroad; for a glance at clauses 11 and 12 of the Amendment Act will prove to

us how jealously the right to deal in the County Court with land or title is still guarded. Under the 11th clause the County Court has jurisdiction in actions of ejectment where the annual value of property does not exceed £20, and under clause 12, the County Court may try cases where title comes in question where neither value nor rent of property exceeds £20.

Why this miserable sum should be the limit of the power of the County Court in such matters, we know not, for under the 9th clause of the proposed Admiralty Jurisdiction Bill, the County Court has a jurisdiction to the extent of £500 over any claim arising on any charter party, bill of lading, or other contract respecting the use and hire of any ship, or the carriage of goods therein, as between the immediate parties to such contract, or as between the owner of the ship, and any person claiming through or under any such party, and over any claim concerning any ship or goods relating to freight, insurance, demurrage, average, general, or particular, or short delivery of or damage to cargo, and generally over any claim of a civil and maritime nature, relating to any ship, or to the goods carried therein.

We need not tell our readers that the above could in all probability cover 99-hundredths of the actions brought in respect of such matters, and no wonder that a petition, signed by many of the most competent authorities, has been presented to the Lower House, praying that before such extensive powers are conferred upon the County Courts, the whole subject of the process and administration of the law in the superior courts should be inquired into.

Such changes may be beneficial—but we think the passing of any such Act would only tend to make “confusion worse confounded.”

Questions involving the most subtle and difficult points of law, involving interests and amounts vast beyond expression, will and must arise—questions incomparably of greater moment than the question of title to half the houses or premises in the country.

We have very briefly touched upon a few of the topics an examination of this Amendment Act has suggested. Although we are ready to make every excuse for a government that has been pressed and harassed upon every side during this stormiest of sessions, and with a Reform Bill upon their hands little time for anything else could be found; still, that which has been attempted, and that which has been actually accomplished, is hardly matter for congratulation.

A vast field for legal philanthropy is open—the subject of imprisonment for debt, the bankruptcy of our humbler and poorer brethren, is before us, and we may hope that a subject pregnant with the happiness of thousands will soon find exponents. But it is somewhat disheartening to find, that while many subjects of the utmost importance are passed over in silence, simply for want of the thought and power and influence necessary for their consideration, the statute book of this realm, so fast being cleared of rubbish by the labours of Mr. Reilly and Mr. Wood, is to be increased in bulk by this ill-drawn and ill-considered Bill of the Lord Chancellor's.

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#### ART. VIII.—HEALTH LEGISLATION.

THE Dublin correspondent writing in the *Times* of July 11th, says, there has been no case of small-pox recorded in the past quarter, and adds that for this the Irish nation has to thank the operation of the Compulsory Vaccination Act; as well might it be written, “thanks to the indefatigable industry, tact, and statesmanship of the Chancellor of the Exchequer in proceeding with the Representation of the People Bill, we have had no death from cholera recorded in the Metropolis during the past week.” It may well be asserted that spite of all that has been lectured and written and urged on the subject of health, in books and reviews, in our Houses of Parliament, in colleges and halls, there is still the most profound ignorance on the part of the general public as to epidemic or contagious

disease, its seat, its incidence, prevention, and cure. Diseases, like monsoons, revolve in cycles and circles. Now here, now passed away, the seasons of presence and absence can be predicated in no physical conjunction of phenomena, for when these are not at all at variance, so far as our means of observation are concerned, we may have entire immunity or fearful pestilence. The essentials of epidemic diseases, it must be acknowledged, have escaped us—and there is no train of phenomena which can be artificially created or be naturally present, which inevitably lead to visitation of cholera, small-pox, or fever. These come sweeping over the face of the country in great lines of devastation, but they leave in their tracks towns, cities, and villages entirely unvisited, which, all circumstances being equal, at the very next advent of the same scourge are the very spots where the fell destroyer seems most fearfully to linger, as though there the disease, whatever it may be, found more of food, from the very fact that these places had been spared in previous visitations to other localities. It is notorious that epidemic diseases carry off the dissolute, the depraved, the poor, and needy, those worn out by watching, by privation, anxiety, or debauch—the badly housed, the thinly clad, the sparsely fed, are the first, the sure victims.

But as to small-pox and vaccination and its compulsory application as a remedy, it is impossible that the entire absence of the disease in any given time can be traced to present enactments of the legislature, however potent and wise—for these deal with infants solely—and it is a part of the case that thousands of adults who have never been thoroughly subjected to the vaccine disease, cannot be reached by any Act of Parliament, and are yearly by death showing the effects and becoming causes of the disease, by first themselves becoming affected and their bodies covered with the eruption, and thus proving seed-beds from which are wafted the fatal germs to produce in other constitutions the developed disease. Just a word or two, to place the present position of affairs before our readers. This loathsome disease, has long been a scourge to the country ; it

survives until to-day from the period when foreigners would not marry Englishmen lest they coming here should either be disfigured or die. For this disease there were two remedies proposed. 1st. Inoculation, which consisted in introducing the matter of the pustules into the system and bringing on an attack of the disease which was often more mild thus self-induced, although sometimes sufficiently severe to cause death. This led to its abandonment, and now by 3 & 4 Vict., c. 29, amended by 4 & 5 Vict., c. 32, any person practising this attempt to produce small-pox, although with the best intentions is liable to be proceeded against, and upon conviction before two justices to be imprisoned for a term not exceeding one month. Yet in spite of this, we have reason to believe the practice in some parts of the country is still surreptitiously in use. The other remedy is by inserting in the arm or other part of the person, vaccine virus, that is, matter obtained from the cow, which animal is subject to a certain disease of the teats, and by Dr. Jenner's inductive reasoning, after a long course of experiments, it became conclusively proved that persons once having the vaccine disease were exempt from the graver visitation of small-pox. After great opposition, it was at last accepted as an invaluable addition to our armamenta in the cure and prevention of disease, that a few punctures should be made in the arm of a child, the vaccine matter introduced. This brought on a slight attack of fever, the raising of as many pustules on the arm as there were intended punctures, and at the cost of a few scratches and a comparatively trifling amount of irritation of the system, complete apparent immunity was gained for what we do not hesitate to describe as having formerly been the greatest scourge of English humanity. Of its value, a comparison of our streets and public places to-day and half a century ago, to say nothing of our bills of mortality then and now, will amply testify. In place of the seared and deeply pitted visages then that met us at every turn, God's image disfigured, seamed, and too often blinded, it is now comparatively rare to meet any severe traces or vestiges of the disease.

It is, to say the least, extremely strange, if it be not another example of the perversity of human nature, that while it has been conclusively proven that inoculation is dangerous and bad, and vaccination safe, useful, and full of value, there must be penalties enacted to prevent the public from using the injurious, and compulsory legislature to force the application of the beneficial. By the 3 & 4 Vict., c. 29, amended by 4 & 5 Vict., c. 32, boards of guardians are to appoint medical officers as gratuitous vaccinators, and to pay them fees for cases operated on. This Act is supplemented by the Compulsory Act of 1854, 16 & 17 Vict., c. 100, which enacts that parents shall have their children vaccinated, except where certified to be improper, within three months after birth, and provides penalties if, after due notice, the child is not vaccinated. The levying of penalties was found to be unworkable from technical defects, and the Amendment Act, 1861, 24 & 25 Vict., c. 59, authorised the board of guardians to employ a person to prosecute in cases where there had been default, and to pay the expenses of all proceedings under the Act. That this has failed to secure adequate extension of the protective process of vaccination is evidenced by the present Bill.

The objections to vaccination are mainly a dread on the part of the public to introduce into the system a cow disease, which is thought to be unnatural, and, more powerfully still, an objection to have matter taken from one child introduced into the system of another, lest all the diseases and tendencies to disease of the one child may thereby be induced in the other, the recipient. To this must be joined also the fact that vaccination does not provide perfect immunity from the disease, re-vaccination has been found after a lapse of time to become necessary, some systems seem to be incompetent to mature the vaccine disease, in some it is no protection; in others it gives rise to or is accompanied by troublesome eruptive skin diseases. These enumerations will at once show that it can be no matter of surprise that with all medical doctrines still so much a matter of dispute, and one class of opinions being certain to raise up

another directly antagonistic, that apathy should exist in one portion of the public and violent hostility in another. Ought the law to step in under these circumstances and compel, in the interests of the public, that private feeling should give way, and that particular must vanish in the view and for the benefit of general. The theory of the good of the many, even at the expense of the few, is pushed here to the most vital extremity. Our constitution, with the greatest hesitancy, applies the rule to property, with how many more safeguards should the person be encompassed? But we are less concerned in the discussion of the fundamental principle than in an inquiry of how far the practical means proposed are likely to be successful in accomplishing the end in view,

The medical officer of the Privy Council, writing in 1863, reports to their lordships,

“That the laws now in force for the purpose of extirpating small-pox are not likely to accomplish their object, and that the system established by law for the provision of public vaccination works in an unsatisfactory manner.”

On the authority of the Epidemiological Society, writing in 1864, it is stated that “3,250 persons die on an average every year in England from small-pox. In the metropolis alone the average annual mortality from this disease exceeds 700. And at epidemic periods,” of uncertain but frequent recurrence—

“the mortality assumes much higher proportions, and in the epidemic which ravaged London last year (1863) and had not in 1864 quite ended, nearly 2,500 lives have already been sacrificed. The very large majority of deaths for small-pox, is in young unvaccinated children, but there is especially at epidemic periods a considerable mortality among imperfectly vaccinated adults.”

Mr. Marson, a very high authority on this subject, states “that there were in the year 1863 one hundred and twenty-three deaths from small-pox in the hospital, and that in only three of these, had the vaccination been such as all persons



ought to receive for their full protection." It is further stated from the records of the Small-pox Hospital, that the mortality of unvaccinated persons was 47 per cent. of the attacks, 15 per cent. of the imperfectly vaccinated, and less than one per cent. among the properly vaccinated. It should however, in fairness, be stated, that the medical profession are divided in opinion as to the possibility of arbitrarily defining, by examination of the marks left by vaccination in after life, whether or no the operation has been adequately performed in childhood. It is certain that no operation is more easily performed, or one that requires less skill to its successful issue, a few superficial scratches with a blunt lancet or other like instrument being sufficient to ensure success. But we think all are agreed that the vital point is the use of liquid lymph, that is matter taken directly from arm to arm, and that more failures are due to the use of dried lymph, than from all other causes put together. Indeed, it may be asserted, that except in very exceptional cases of peculiar idiosyncracies, where constitutions absolutely refuse to take in the vaccine disease, the use of fresh lymph, makes it a matter of little moment whether scratch, puncture, or whatever other method of introduction of the virus be adopted. But supposing the operation successfully and therefore skilfully performed, we may join in that opinion of the Epidemiological Society "if all were thoroughly well vaccinated in early infancy, small-pox might be nearly banished from our death registers." The society are very strong on the effectual performance of the operation, but, in truth, we think the evidence defective, that effectual vaccination can only be judged of by its being an effectual preventive, and not by the metes and bounds of the operation as shown on the arm. The following tables are valuable as showing up three periods, where different plans have been in operations.

*Tables showing the Annual Mortality from Small-pox in England and in London in three periods, (1) before the enactment of any vaccination laws; (2) after vaccination was provided gratuitously but was not obligatory; and (3) since vaccination has been obligatory.*

1. DEATHS FROM SMALL-POX IN ENGLAND.

1. Before the enactment of any Vaccination Laws.		2. Vaccination provided gratuitously, but not obligatory.		3. Vaccination obligatory.	
Year.	Number of Deaths.	Year.	Number of Deaths.	Year.	Number of Deaths.
1838	16,268	1841	6,368	1854	2,808
1839	9,181	1842	2,715	1855	2,525
1840	10,434	1847	4,226	1856	2,277
		1848	6,903	1857	3,986
		1849	4,645	1858	6,460
		1850	4,666	1859	3,848
		1851	6,997	1860	2,749
		1852	7,320	1861	1,320
		1853	8,151		
Average Annual Deaths.	11,944		5,221		3,240

2. DEATHS FROM SMALL-POX IN LONDON.

1. Before the enactment of any Vaccination Laws.		2. Vaccination provided gratuitously, but not obligatory.		3. Vaccination obligatory.	
Year.	Number of Deaths.	Year.	Number of Deaths.	Year.	Number of Deaths.
1838	8,817	1841	1,053	1854	694
1839	684	1842	360	1855	1,033
1840	1,285	1843	438	1856	531
		1844	1,804	1857	166
		1845	909	1858	242
		1846	257	1859	1,158
		1847	955	1860	898
		1848	1,617	1861	217
		1849	518	1862	345
		1850	498	1863	2,012
		1851	1,066		
		1852	1,159		
		1853	211		
Average Annual Deaths.	1,859		826		723

In reading these tables, especially the one relating to London, the progressive increase of population must be borne in mind. The deaths from small-pox in England, from 1843 to 1846 inclusive, are not separately given in the Registrar-General's reports.

But any one who carefully studies these tables, and sees the general result so strongly in favour of compulsory vaccination, cannot but be struck with these facts: that in the year 1858, five years after compulsory vaccination, the deaths were more than double those in the year 1842, a period of seventeen years after the introduction of gratuitous vaccination; and that while there is certainly a very considerable reduction, yet that epidemics have still so large an amount of pabulum among the general public, as to make small-pox very far from being entirely, or very nearly, vanquished by compulsory vaccination. This will be painfully evident by looking at the Metropolitan Table, from which it appears that in the very last year recorded, 1863, there were a greater number of deaths recorded from small-pox than any year for the past quarter of a century, making us fear that some other causes besides compulsory vaccination have had to do with the diminished figures of the disease. In fully considering the subject, we quite agree with a report presented to the Metropolitan Board of the British Medical Association last year—

“That an Act, to be thoroughly carried out in a matter like compulsory vaccination, must be simple in its provisions, so as to entail as little trouble as possible upon parents and vaccinators, and that the vaccinator should be properly paid for his time, skill, and labour.”

This is really the stumbling-block of the whole matter. The niggardliness of boards of guardians, and the avowed intention to make these vaccination fees a kind of compensation for inadequate payment for the performance of the general duties of medical officers of unions, is at the very root of the difficulties which beset the question. It is alleged that the

registration records of the country show that a very large proportion of children are unvaccinated. Nothing could be more fallacious than to adopt this test. Spite of all the legislation up to this time, there are medical practitioners all over the country in large practice, who have never signed one single certificate to send to the registrar. If these gentlemen are communicated with, they reason thus, and it applies with great power—

“At least one-half of the cases we vaccinate are done gratuitously, without any payment even being asked for or received. Why should we, after having, in a missionary spirit in protection of the public health, conferred a public benefit, be called on to spend our time and money in filling up and forwarding certificates of successful vaccination, which, in the present state of the registration of births, is deemed to be useless.”

It was therefore urged on the Select Committee to whom the Bill was referred—

“To abandon the attempt, futile as it has hitherto proved to be, of forming a complete register of all children successfully vaccinated. This register, which entails considerable trouble and expense, even if it were possible to render it complete, would, in the opinion of the committee, be of little or no practical utility. Certainly, as yet, it has never been of the slightest use to any one. If this were given up, it would, by abating trouble and annoyance to vaccinator and parent, directly tend to stimulate vaccination; and the other provisions, especially that relating to the remuneration of the public vaccinator, could be made more effective.”

The reasons, more at large, against the registration of vaccination, are well put by Dr. Gibbon, the able medical officer of health of the Holborn district, in his report to the Board of Works, of April 14th, 1866—

“1. Because such register, founded, as it is proposed, on that of the births, would be incomplete and delusive for statistical purposes. The registration of births, not being compulsory in England and Wales, is far from complete. It is estimated in large towns that

about 12 per cent. go unregistered. If the birth of a child is registered in one district, it is very frequently removed into another before it is vaccinated, so that the difficulty of recording the vaccination six months subsequently side by side with the birth, will in many cases prove insuperable, especially when it is to be effected by a certificate passing through different hands.

"2. Because such register, if it could be rendered complete, would be of no practical utility. It is usual and far easier to ascertain whether a person has been vaccinated by direct inspection of the arm, than by calling for and consulting certificates and registers, the genuineness of which may be doubtful.

"3. Because such compulsory registration will discourage rather than promote vaccination. The penalties, the certificates, and the trouble it inflicts on parents and practitioners will deter many from having anything to do with the operation. The case of the public vaccinator is, under the present Bill, as follows: For performance of an operation requiring skill and time, and recording full particulars in a return to the guardian, he will, if successful, receive 1s. 6d., but in case he neglects 'what he well knows to be a useless piece of red-tapism,' to write two certificates and to send one of them to the right registrar within twenty-one days, he will be subject to a fine of 20s.

"4. Because the expense to the ratepayers, viz., the cost of stationery and postage, and the fee of 4d. per case to the registrar, will be considerable."

The Bill of last session, as altered by the Select Committee to which it was referred, provided for thorough districting as regards vaccination, under the supervision of the Poor Law Board; provided for the appointment of duly qualified vaccinators; out of the Consolidated Fund proposed to pay a gratuity of one shilling for every successful case; and fixed the minimum to be paid by the guardians at one shilling and sixpence, two shillings, two shillings and sixpence, and three shillings respectively, according to distance, with various regulations as to stations, &c., at which the operation could be performed. Then came an absurd provision, recognising the fact that re-vaccination was sometimes

necessary; that successful re-vaccination should be paid for at two-thirds of the fees paid for first vaccination, as though it required only two-thirds of the time, trouble, and skill to perform the operation the second time; while if the operation be unsuccessful no payment was provided. No vaccinator was to be allowed to poach on the manor of his next door or other neighbour, if he did he was to receive no fees. Then came the registration clauses: notices to parents to have their children vaccinated; and, when vaccinated, the public vaccinator was to forward a certificate of successful vaccination, and upon request to deliver a duplicate certificate to the parent of the child. Where the vaccinator has been a medical practitioner, not a public vaccinator, the parent is to transmit the certificate to the registrar; and if failing either to have the child vaccinated, or to send the certificate, then the public vaccinator, or parent, or person in default is to be liable to a penalty of twenty shillings. Justices may order any child under 13 to be vaccinated, and any person disobeying the order may be fined twenty shillings. This Bill, originally brought in by Mr. Bruce, was withdrawn last session, and is again introduced this session by Lord Robert Montagu. The objections to it are manifold. It is not careful as to the repeal of Acts. The 24 & 25 Vict., c. 59, has some useful provisions, enabling medical officers of health in certain cases to take proceedings, which, if compulsory legislation on this subject is to prevail, should be retained. The payments are inadequate; the whole system of registration has been tried and found wanting; it can answer no useful purpose; it has been fourteen years in operation without effect, costing nearly £10,000 per annum. Even those persons who would be expected to be most attached to the red tapeism of their own offices, have condemned this system, and one vote of disapproval from the Registrar-General, the district registrars, officers of health, and poor law medical officers, exhibits a singular coincidence of opinion in its disfavour. The provisions of the Act, too, are humiliating and unjust

to medical practitioners, and exhibit a distrust of their honour, which is fatal to success. They show also an entire ignorance or disregard of sanitary precautions, in insisting on retention of stations for vaccinating, and the consequent bringing together of materials for engendering or propagating disease. Make what compulsory provision you will, the question really comes back to this—Is the medical profession to be expected zealously to work a measure from the provisions of which they entirely dissent? And can any measure succeed without their most zealous co-operation?

The contracts for gratuitous vaccination are, in truth, taken by medical men to keep rivals out of their districts, fearing that if taken by others who are strangers, they might prove stepping-stones to practice, and this jealousy has been acted on by boards of guardians to the detriment of the public. For while it is asserted with truth by the profession that these contracts are insufficient, they are so much in advance of the wretched payment made for the discharge of the general duties of the Poor Law Medical Officer, that they become important to him in raising the general average payment for his services. But, if this system is to be carried out, the Bill is defective in not containing a clause calling on the board of guardians of any given district at stated periods to prosecute all defaulters, for it has been truly said that permissive legislation which involves taxation is permission to do nothing, and experience, especially of health matters, amply proves this to be the result. The registration machinery is cumbrous, ineffective, and unnecessary, the requirements as to stations vicious and likely to lead to bad results, and the whole conceived in a narrow spirit, which is only correct on paper and can never be successful in working. But, it may be asked, what remedy is there for such a state of neglect as now assuredly prevails? It has always appeared to us that the remedy, so far as vaccination is concerned, is simple and at hand. Take all control of vaccination and, indeed, of health matters, except providing for sickness of paupers, out of the guidance and

disposition of boards of guardians, who in dealing with sanitary questions, generally have proved themselves wholly unequal to the task. We want in truth a Health Ministry, adopting in part the plan of the Prussian Code, which has a minister for ecclesiastical, educational, and medical affairs, and attached to it a royal scientific commission for medical affairs to take charge of the momentous matters daily arising with respect to public health, and which are now allowed pretty much to have their own way until some dire pestilence awakens a feverish anxiety to do something in our ordinarily lethargic boards. Local boards of health, under uniform enactments with equal powers all over the country, should supervise these matters—the central body being a court of appeal in cases of difficulty or dispute. Make all registered medical practitioners public vaccinators, and let them be paid reasonable fees for the operation. The confidence thus reposed in a noble profession would not be abused, and complaints among themselves would soon die away, and feelings of rivalry cease. We adopt the same plan when cholera visits us, and it becomes essential by the aid of medicine to check that scourge—why not make a vigorous effort to stamp out small-pox? Make it the direct interest of medical men as well as an exercise of their philanthropy to vaccinate, and re-vaccinate. It will be national money and well spent for a national benefit, and will have more effect than volumes of such Bills as the one now before us. The apathy and indifference of the public cannot be overcome by coercion, the influence and kindly efforts of the medical profession appear to us alone calculated to effect the object.

Another session has passed over without any further attempt at health legislation. It must be a vigorous effort indeed that will free us from the entanglements into which Public Health Acts, and Acts constituting as health guardians, nuisance authorities, sewer authorities, and boards of guardians have brought us. At present there is no adequate law which includes the whole country. In many districts the



Public Health Act or the Local Government Act has been adopted solely to prevent the operation of the Highway Acts, and the boards so constituted have absolutely done nothing to help the sanitary condition of their respective neighbourhoods. By a blot in the Sewage Utilization Act, continued in the Sanitary Act, 1866, many portions of districts are entirely excluded from their operation. And the confusion of interpolating sections of various Acts of Parliament in one Act, without due consideration of how they would work when forcibly dis severed from their antecedent and following sections, has rendered it often a matter of impossibility to determine what powers can be taken under the Act, or who were to exercise them. The whole difficulties of the present state of matters is admirably summed up by the Council of the National Association for the Promotion of Social Science, recently submitted to his Grace the Duke of Buckingham, President of the Council. We earnestly ask the attention of all interested in health legislation, to the very important matters it contains.

“The laws relating to public health are numerous and diverse; and, as different subjects of legislative interference arise from year to year, become more complex and more difficult to interpret and apply.

“Some of the enactments are general, some local. The provisions of the latter are often of universal value and applicability, and might beneficially be introduced into the former. In other instances there are different enactments relating to the same cases, with different penalties for the same offences. For instance, sec. 63 of ‘The Public Health Act, 1848,’ and sec. 2 of ‘The Nuisances Removal Amendment Act,’ 26 & 27 Vict., c. 117, intended to prevent the sale of diseased meat, and collateral in their operation, impose a penalty, the one of £10, the other of £20, in precisely similar cases. This, of necessity, leads to confusion.

“Some important enactments are permissive; indeed, this principle very extensively pervades sanitary Acts of the greatest importance, and consequently they are seldom acted upon. For instance, sec. 22 of ‘The Nuisances Removal Act, 1855,’ where, when ditches, etc., are a nuisance, it is left to ‘the opinion of the local authority,’ to decide whether the nuisance requires a sewer for its abatement, and

secs. 23 and 24 of 'The Sanitary Act, 1866,' relating respectively to the provision of means for disinfection, and of carriages for the conveyance of persons sick of infectious disorders; sec. 27 of the same Act, and sec. 81 of 'The Public Health Act, 1848,' concerning the establishment of places for the reception of dead bodies; and sec. 52 of 'The Public Health Act, 1848,' with reference to compelling a proper provision of closets in factories, are all permissive.

"The bodies appointed to administer health laws are not always identical, as it is evidently expedient that they should be. There are natural connections which ought not to be disregarded—*e.g.*, the supply of water with the removal of waste; the large with the small means of drainage. These are under diverse authorities. Without bodies of more general and uniform powers, wider districts, and highly qualified officer of health precluded from private practice, Health Laws cannot be made fully successful in their operation. 'The Sanitary Act, 1866,' constitutes sewer authorities, differing in some respects, from local authorities under other statutes. The Common Lodging Houses Acts are committed to the management of the police of the metropolis, to local boards of health, to town commissioners, and justices in other places. The appointment of analysts rests with the court of quarter sessions in counties, and with the town council in boroughs, having a separate peace jurisdiction, instead of with the usual authorities for sanitary purposes. Further, this most important appointment is seldom made, as the law merely gives a permission to appoint.

"The local authorities are more or less unlearned, and for that reason require plain and specific directions. They are interested in diminishing the rates, unmindful of the probable costliness of their parsimony; and they are, therefore, frequently unwilling to act in sanitary matters, except under compulsion. They are often ignorant of the importance of sanitary precautions, and indifferent to flagrant nuisances, and to the serious consequences arising therefrom to individuals, to others beyond the offending district, and to society at large. Hence the need of a special and central department to stimulate an unwilling or inefficient local authority, to act as a court of appeal, to diffuse to all the knowledge obtained from districts that have no connection with each other, to protect individuals and minorities against injustice, and, being possessed of the highest

practical knowledge, to construct or sanction bye-laws and local regulations.

“ The Building Acts, which should at least contain sound rules for insuring due attention to health in the erection of habitations, are very deficient indeed in this point of primary importance. In some few places bye-laws are even now made to serve the purpose. It is undeniable that without some very uniform and stringent additions and alterations to Building Acts (one of which is now being promoted by the Metropolitan Board of Works), the construction of healthy dwellings, especially for the poorer classes, known and acknowledged to be required on a very large scale indeed, will most deplorably fail ; and the new tenements will doubtless be as bad as the old, or even worse.

“ The sale of unwholesome and adulterated food calls for very serious attention, and for a much more efficient law. The present law is full of difficulties and defects, is much complained of, and is almost in-operative.

“ While, therefore, the Acts remain so complicated and multifarious, as are those now in force, it is impossible to hope for an efficient sanitary administration ; especially as the principles underlying all true sanitary law are the same, more or less applicable in the same way in all places.

“ On these grounds the Council earnestly submit ; for the favourable consideration of the government—

“ 1. That the laws of public health require to be revised and consolidated with plain and specific enactments on all sanitary matters.

“ 2. That permissive enactments are generally taken to be permissions not to act, and that the most useful provisions should be made peremptory.

“ 3. That the constitution of the sanitary authority should be more uniform, and its powers and functions more comprehensive.

“ 4. That the inefficiency in the administration of the health laws by the local authorities is in part due to the absence of a central power, which could be appealed to without reference to the courts of law, and could by means of judicious advice, and, if necessary, by legal compulsion, cause the local authorities to do their duty.

"The council submit that, until some such reforms as these are effected in the laws, the further improvement in the sanitary condition of the kingdom must be checked and thwarted to the detriment of the present and permanent welfare of the community; and that the laws already in force, some more, some less, fail in their action from want of these further reforms."

Since the above was in print, a Bill has been, July 18th, introduced into the House of Commons by the Home Secretary, to amend the Sewage Utilization Act, 1865, which adds another to the many difficulties to be surmounted in understanding our present position. It provides for the exercise of the sewer authorities' power beyond the limits of its district, enables the sewer authorities to purchase land for these purposes, and to dispose of it as they may see fit: it proposes to repeal the enactment we have repeatedly pointed out as so injurious in its operation, the 2nd sec. of the Sewage Utilization Act, 1865, which excluded parts of parishes from the operation of the Sanitary Act, and so makes them into special drainage districts. Then comes another wonderful permissive clause, enabling persons not having a known and defined boundary to apply to the Secretary of State to settle a boundary in accordance with the provisions of the Local Government Act, 1858, and to constitute such place a special drainage district. Now, either there are no places to be legislated for, and in that case this clause is unnecessary, or if there are, the provision should be imperative and not permissive—which is simply useless. Powers are also to be given to sewer authorities to combine and form a joint sewerage district and joint sewerage board. This enactment will be useful, but might have been carried out under the old Acts. There are also useful clauses as to making and collecting rates under the Sanitary Act. But there are still many difficulties, and those not unimportant which are still left untouched.

W. H. MICHAEL.

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## ART. IX.—THE SHEDDEN CASE.

PRIVATE sorrow retains but for a short time the sympathy of the public. A story of injustice done to a family or individual when it is first told awakens comment and indignation. But the story rarely is able to stand repetition. The world has other things to think about and to do, and the victims of private wrong are left to their fate. In their struggles to seek redress they may secure some sympathy; but as time rolls on, as their struggles increase, and as their hopes fall, that sympathy becomes less. The Shedden case which has been going on since the commencement of this century, and which is once more to be argued next month in the House of Lords, is one that deserves public attention more than any other celebrated cause that has been tried in our times. If the allegations of the petitioners are only in part true, the legal process of the courts of Scotland and England have been made the instruments for the infliction of a great injustice, and for the ruin and degradation of an old and honoured family. If the story of the respondents is true, it can be said of them that their ancestors acted within the law, but few would be prepared to say that even then they acted with social honour and with a due regard to the pious behests and the imposed confidences of a deceased relative and benefactor. Most people are, however, now tired of the Shedden case. The efforts of the petitioners to relieve the imputation of illegitimacy and alienage, which half a century has fixed upon them, do not awaken the attention that some may think they deserve. The majority have vague notions about the details of the case, with which they are content. But as it is once more to come before the public we may venture to repeat the salient points of this remarkable story. It will be no part of our duty to take a partial view of facts which have often been discussed before, and with regard to which many

have formed fixed notions. We shall take special care to avoid the expression of any opinion upon those points that are to receive next month the judicial consideration of our Supreme Court of Appeal. We purpose solely to narrate facts, and in this way to enable our readers to appreciate the arguments that will be delivered next month at the bar of the House of Lords.

In 1770, William Shedden—a young man of three-and-twenty—went from Scotland to Virginia, then a British colony, as junior partner in a Scotch mercantile firm out there. He was the heir to an old family estate in Ayrshire—called Roughwood—and he went away with the intention of returning to Scotland after a certain number of years. The co-partnership bond stipulated that his passage should be paid there and home again—and in his correspondence with his relatives in Scotland, he often spoke of the prospect of his speedy return home. But business engagements, the outbreak of the American revolution, which took place soon after his arrival in the colony, and other causes, prevented his return. In the political disturbances William Shedden took the loyalist side; he was obliged to fly from Virginia, and take refuge within the British lines at New York. In 1778, with many other British loyalists, he went to Bermuda to await the settlement of the colonial difficulty, which undoubtedly they thought would soon be decided in the King's favour. Being a man of great shrewdness, and of active business habits while at Bermuda, he established a mercantile firm, which was successful. He had been in the meantime declared an alien enemy and an outlaw by the state of Virginia—and he was even debarred by local statutes from using the courts for the recovery of his property. In 1783, on the cessation of the political disturbances, he went to New York to prosecute before the commissioners then sitting there, his claims for compensation for losses as a British loyalist. He then wrote home to say, that as soon as he could get his affairs settled, he would return and settle in Scotland for life. In 1789, the flame of the great

revolution was lit in France, hostilities commenced between France and England, and the young American republic mindful of the services that France had rendered her in her struggle for independence sided with that country. William Shedden could not be idle, and while waiting at New York for the settlement of his loyalist claims opened a new mercantile house there. The French war placed him in an awkward position as a merchant. In 1793, he complains that "the war entirely deranged all his plans" and "delayed his return home." His claims as a loyalist still were unsettled, and, as a matter of fact, they remained unsettled until 1802, four years after his death. On November 13th, 1798, William Shedden closed his eventful and active life in New York, at the early age of 51. He was a man of ability and of good repute. He was active in his philanthropy; and his respectability as a merchant and as an inhabitant was unquestioned during his life. A New York newspaper, in recording his death, says of him:—

"It is but a small tribute to the memory of this gentleman to say that in him society has sustained a loss almost irreparable. His philanthropy knew no bounds; his great and shining talents were uniformly asserted for the good of mankind. As a merchant, his opinions were almost equal to a law; they were founded on the unerring principles, the immutable basis of justice and of truth."

Mr. John Patrick, who was afterwards one of the chief instruments of frustrating his intentions, is said thus to have written of him a few days before his death:—"He shines under the shadow of death, greater if possible than when in the sunshine of posterity. He has a heart pure and untainted; his memory with me will be always held in the most reverential remembrance."

Before we go into the question of the marriages, that it is alleged Mr. W. Shedden contracted while in New York, it is desirable that we should consider the marriage law of that state at that time. And here we are relieved of considerable

difficulty by the admission made by Mr. Rolt, who argued the case before the full Court for Divorce and Matrimonial Causes.

“And here is a point,” said that learned gentlemen, “on which there is no difference between us. The law of marriage in America is accepted by me as laid down by their legal witnesses, and that law is this (and it is a very important thing to bear it in mind throughout this case) : no ecclesiastical or other official ceremony is necessary to celebrate a marriage. A contract between the man and the woman is all that is necessary. The contract must be proved. There must be the fact of marriage as in England ; but in England an ecclesiastical ceremony is necessary. Still there must be a contract of marriage, and in America as in England the fact of marriage may be proved by habit and repute. Now, I accept as a fact that there is no ecclesiastical or official ceremony necessary. I will not enter into the question of what the law of Scotland may be, or whether there may be a difference between the law of Scotland and the law of America. In the law of Scotland, it has been said that a man may find himself married without knowing it at all ; that is not the case by the law of America.”

Lord St. Leonard’s however, in his judgment in the House of Lords (Macqueen, H. L. R., p. 646), seems to express his opinion that in New York, “cohabitation and acknowledgment will amount to marriage.” But as Mr. Rolt accepts the law on this point as laid down by the evidence taken by the petitioners, it is desirable that we should see what that evidence is. Mr. Daniel Lord says—

“That no form or ceremonial is a requisition of the law of the state of New York to constitute a valid marriage. The agreement to take each other for husband and wife *in presenti* followed by cohabitation is alone requisite. Independent of the proof of those present at the marriage, living together openly in society as husband and wife, the acts of the parties acknowledging each other in the ordinary course of life as husband and wife ; and especially acts of the parties whereby they introduce each other, and are by means thereof received in society as bearing the open and honourable



relatives of marriage ; these would be evidence of fact from which the marriage would be deemed proved."

Mr. A. W. Bradford corroborates this witness. He expresses the opinion that—

"The only law relative to the marriage contract, anterior to the year 1830, in force in New York was the common law of England as understood and received in this state to have been the common law of England, anterior to the English Marriage Act of 1751."

Mr. Lord, however, does not seem to agree with him in this. That gentleman expresses the opinion—

"That the common law of England never was in force in New York on the subject of marriage. Marriage in England was regulated by the ecclesiastical law which never was a part of the common law of New York. As to the manner of contracting it, our unwritten law of marriage was a local common law affected by the usages of the Dutch, the usages of English Church-men and Dissenters, and the usages of the Scotch."

Mr. W. Kent is of opinion—

"That any acts evincing an agreement of the parties before witnesses to take each other for husband and wife constitute a valid marriage by the laws of the state of New York. Where a man and woman are known to have cohabited and to have held each other out as husband and wife, the marriage would be presumed, except in cases of bigamy and adultery."

He expresses the opinion that "the common law of England was the governing law of the state."

It is alleged that Mr. William Shedden married in New York Miss Rachel Kennedy by civil contract, according to the law of that State in 1785. A daughter, Annabella, born in 1786, was the only issue of this marriage. Her legitimacy is denied by the respondents. It has little bearing upon the case, and we need not consider the evidence upon it. At

Trinity Church the following entry is found of the baptism of this child :—

4th October, 1786.

Parents' names : William and Rachel Shedden.

Sponsors : P. Kenyon, Rachel Kennedy, Elizabeth Oetzen.

Mrs. Rachel Shedden died soon after the birth of her only child. We now come to that part of the story upon which the whole controversy is based. Living at Fort Washington, in New York, near the house of William Shedden, 'was a gentleman of the name of David Wilson. He was a man of respectability, although not of wealth. He and his wife were of Scotch origin. Formerly he had been in the British army. He had two daughters, one of whom married well in life; his younger daughter, Ann Wilson, it is alleged was married to Mr. William Shedden by civil contract, in 1790. It is certain that at that time this young lady, then not more than sixteen years of age, went to live with him as his wife, and she continued to live with him as such until his death, in 1798, in the house near that of her father. There is no direct evidence of the contract of marriage, but there is plenty of evidence to show that Mr. Shedden passed her off as his wife, and that she was received and considered as such by most respectable people in New York. Mr. Justice Whitman, in his examination of the evidence that bears upon this point, said—"It might be a question if the case turned wholly upon the presumption of the marriage arising from cohabitation, reputation, and treatment, whether there would be sufficient evidence to warrant, *prima facie*, such a presumption? Upon the whole I am inclined to think there would." But this does not appear to give this part of the case the weight that it deserves. If there was no other question involved than that of proof of marriage by habit and repute, we should say that it would be difficult to carry the proof much farther. It is clear that Mr. Shedden introduced this young lady as his wife to the best society in New York, and that she was received there as such. Mrs. Shedden took her part in her husband's philanthropic exertions, and

thus got associated with ladies of known character and benevolence. On February 19th, 1855, an ejectment suit was brought in the Supreme Court of New York with the view of showing that the children born of this alleged marriage of 1790 were legitimate. On the part of the plaintiff, fifteen witnesses were produced and examined. They established the fact of marriage by habit and repute to the satisfaction of the jury, who found a verdict for plaintiff, the son of Mrs. Ann Shedden, as the heir-at-law of his father, William Shedden. Of the alleged marriage with Ann Wilson in 1790, two children were born, the elder, a daughter, to whom her father gave the name of Jean Ralston Shedden, and the younger, a son, to whom he gave the name of William Patrick Ralston Shedden.

Against the alleged marriage of 1790 there are three or four leading arguments adduced. There are some witnesses who say that they always understood that Mr. William Shedden was a bachelor, but the preponderance of testimony is so strong the other way that they cannot have much weight. It appears that Mr. Shedden, while on his death-bed in 1798, got a clergyman to perform the ceremony of marriage between him and the young lady whom it was understood was his wife. This fact of itself falls very far short of proving that there had not been a previous marriage by civil contract. To satisfy religious scruples and to facilitate proof, it has been usual with those who contracted irregular but perfectly valid marriages in Scotland to go through a formal ecclesiastical ceremony afterwards. It must be remembered, too, that William Shedden was a Scotchman. It was his wish and intention that his only son should succeed to the patrimonial estate in Scotland, and in Scotland a subsequent marriage legitimatises the children. It is only therefore, reasonable to suppose that this death-bed marriage was intended perhaps to satisfy his conscience, but certainly to place in safe position, the little boy that in that trying moment he looked upon as the heir to his name and estate. But the strongest evidence adduced against the

existence of a previous marriage is a letter said to have been written by William Shedden to his nephew, William Patrick, in Scotland. It is urged, on the other side, that this letter is a forgery, and that William Shedden could not have written it, because at the time he was so ill that he could not turn on his bed. It is dated November 12th, 1798—the day previous to his death. In this letter he says, or is made to say, “I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her and two fine children I have by her to honour and credit.” Now the genuineness of this letter is one of the most difficult points in this case, and one that is shortly to receive a thorough investigation in the House of Lords. If it is genuine, it undoubtedly weighs strongly against the existence of the previous marriage; but it certainly is not conclusive. The last words of a dying man—perhaps dictated to him by others who had interests of their own to promote—must not be examined too critically, and must not be allowed to alter the effect of proved and ascertained facts. It is quite possible that William Shedden wrote that letter, although, as a matter of fact, there was an existent previous marriage by civil contract. His words are dangerous and ambiguous. But it is possible that he meant no more than to say “I have ratified my irregular marriage with Miss Wilson by a religious ceremony. I think that this is only due to her and to her children. It places their honour and credit beyond question.” Of this letter the original is not produced. It is made the subject of serious imputations on both sides. But even supposing that it is genuine, it is subject to the suggestions that we have made, and does not appear to be at all conclusive against the existence of the previous marriage.

Mr. William Shedden, had a sister, Marion, who had married Mr. Patrick, the owner of a small estate adjoining Roughwood, in Scotland. Five children were the issue of this marriage—Robert, John, William, Jane, and Elizabeth. If William Shedden had died childless, Robert Patrick would have been

his heir-at-law. Robert was a surgeon in the army; John was a merchant, and was with his uncle at New York; William was a writer to the signet in Edinburgh. At the time of William Shedden's death, Robert and William were factors and commissioners in charge of his estate in Scotland. In his will, made a few days before his death, he nominated John Patrick, one of his executors, and he appointed William Patrick testamentary guardian of his son. He gave in it elaborate directions for the education of his children. It is evident from this will and his letters, that no doubt passed at that time through his mind, that his children would enjoy the status and rights of legitimacy. It is further evident that those around him at the time entertained no doubt about it. John Patrick, writing from New York to his brother William, three days before the death of his uncle, says, "Every revolving hour threatens a dissolution of his existence—his fate is fixed, he must die—he cannot live." He then tells his brother of the will, of which he says. "He may guess the contents," and of the conflicting interests that he will have to watch, "as agent for the heirs." The perusal of the whole of that letter, can leave no doubt upon any mind that John Patrick was fully impressed with the conviction that his uncle's son was his legitimate and proper heir.

The death of William Shedden brought into play a course of policy on the part of the Patrick family which had the effect of placing them in possession of the property that he intended for his children. It is alleged against them, that they entered into a fraudulent conspiracy to deprive this helpless family of their rights, and that they shrank not from wholesale forgery, in order to carry it out successfully. We have no wish to enter into an examination of the evidence by which it is attempted to sustain this serious charge. And in the absence of such an examination we would disclaim giving it our sanction in any way. But there are leading features in the conduct of the Patrick family, that are admitted to be correct, and that are legitimately the subject of comment.

William Patrick was, as we have seen, factor of his uncle's Scotch estate, and was by his uncle's will appointed testamentary guardian of his son. A few months after his death he obtained from the Court of Session in Scotland the appointment of "judicial factor for the interest of all concerned." He stated to the court that his uncle "had executed a settlement of his estate, in favour of certain persons in America,"—but he did not say who those persons were, and that he was the guardian of one of them. There is a process in Scotland called "a retour"—by means of which on the death of a person, an inquisition may take place as to who is his heir. William Patrick, a few months after his appointment of judicial factor, went to the county court of Ayr, held this inquisition, and on formal evidence of witnesses on the spot, got his brother Robert declared the heir of his uncle, and put in possession of his Scotch estate. At these proceedings the existence of his uncle's son was not mentioned—although it must be admitted, on all hands, that at that time William Patrick had a belief, or, at all events, an impression, that he was the heir. If he did not believe in the marriage of 1790, he had—as he confesses himself—some doubt as to whether the death-bed marriage did not make him legitimate, according to the law of New York. And yet, although he is his testamentary guardian, he does not mention the existence of the boy. But "the retour" may be set aside—other proceedings are taken; Mr. Crawford, the partner of one of the Patricks, and the client and debtor of another, is appointed *loco tutoris* of the son, and he institutes proceedings on his behalf in the Court of Session. It is said that these proceedings were collusive, and that Crawford was a participator in the conspiracy of the Patricks. Into that question we need not enter. Mr. Crawford certainly was under many obligations to the Patricks. If he was not fraudulent, he was culpably careless in the discharge of his trust. In acting for this young lad, he did not take the trouble to get all the information he could from his mother. She had employed Edinburgh lawyers to try to get justice for her

child. Mr. Crawford never went near them. Certainly one document was used in the case which came from them, namely, the certificate of the death-bed marriage. But the widow had sent home, attached to it, affidavits, in which the fact of a previous marriage was disclosed. These were separated, and never used until discovered years afterwards. In the proceedings taken by Mr. Crawford on behalf of Mr. Shedden's son, the only point named in his favour was that by the law of the state of New York, the death-bed marriage made him legitimate. This point was decided against him in the Court of Session. The appeal was taken to the House of Lords in order that the decision "might not be challenged," and the result was the same. In the meantime Mr. William Patrick bought the property of his brother Robert. In this statement we have only taken admitted facts. We have not ventured to endorse the charges of fraudulent conspiracy, forgery, and the manufacture of fictitious debts. We have the facts undisputed, that a few years after the death of his father, and during his minority, this boy was deprived of his status and of the property that his father intended for him by his own testamentary guardian, and that that property has remained in the hands of that testamentary guardian and of his successors to this day.

In the year 1800, William Patrick Ralston Shedden, then a boy of six years, was sent from America to his testamentary guardian, William Patrick. He was placed in a school, and afterwards he entered the Royal Navy. He was paid off on the peace, and went to India. During this time, the secret of his birth was strictly kept from him. In 1808, the House of Lords decided against his legitimacy on Hugh Crawford's appeal; but it was not until after the elapse of many years that he learnt anything of these proceedings. In India, he became a merchant, and inheriting his father's business tact and energy, he quickly accumulated a considerable fortune. In 1823, he paid a visit to his friends in Scotland, and while there he obtained some information about the circumstances of

his birth. His suspicions and indignation were aroused, but Mr. William Patrick made explanations which were taken as satisfactory, and he was glad to hurry back from scenes which gave him pain to his duties in India. In 1848, he received further light. He paid a visit to America, and there had conversations with relatives and friends which strengthened in him the conviction that in early life he had been defrauded of his birthright. In 1848, he instituted proceedings against William Patrick and others in the Scotch courts, with the view of having the previous decisions in the Court of Session and in the House of Lords set aside on the ground of fraud. In 1849, by a supplementary action in the Court of Session, he sought a declaration to the effect that he was the lawful heir to William Shedden, by reason of the marriage with Ann Wilson previous to his birth. In 1852, the Court of Session decided against him on the ground that the charges of fraud were not relevant, and that the allegations and averments of such fraud were not sufficient in law. From this decision there was an appeal to the House of Lords, but that House in 1854 affirmed the judgment of the Court of Session. Up to this date, there was not, therefore, any judicial decision on the fact, as to whether there was a marriage in 1790, or not. The petitioner then sought to have special legislation on his case; and in 1857, Earl Grey moved, without success, that a petition which he presented to the House of Lords, should be referred to a Select Committee. In 1858, "The Legitimacy Declaration Act" was passed, and by it a new privilege was conferred upon every British subject. After reciting that it is expedient to enable persons to establish their legitimacy, and to establish their right to be deemed natural-born subjects, it enacts that any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, may apply by petition to the Court for Divorce and Matrimonial Causes, praying for a decree that the petitioner is the legitimate child of his parents, and that the marriage of



his father and mother, or of his grandfather and grandmother, was a valid marriage. In December 1858, Mr. Shedden and his daughter presented a petition under this Act, in which they sought a declaration to the effect that William Shedden and Ann Wilson were married prior to the birth of their two children, and that the son was their legitimate son and heir, and a natural-born subject of the Queen. William Patrick, then an old man of ninety, and the representative of his brother Robert, were cited to watch the proceedings. They put in an answer to the petition, in which they averred that the petitioners were excluded by the previous judgments in the Scotch courts and in the House of Lords. They also traversed the fact of the alleged marriage. The preliminary proceedings were long, but Sir Cresswell Cresswell, then the presiding judge of the court, determined that the case should be tried without a jury, and that the issues of law and of fact should be tried together. Commissions for the examination of witnesses in America and Scotland were issued; and it was not before November, 1860, that the petition came on to be heard. It has been urged with great force that a jury ought to have been empannelled, to try the issues of fact. This Act raises questions of great importance between Crown and subject, and it is very likely often to happen that the Crown may have a direct interest in the judgment of the court. Such being the case, it is only fitting that the issues should be tried by a jury, and not by those who are in the service of one of the parties. At the last moment, Miss Shedden—one of the petitioners—on account of some mistake about the instruction of counsel, was called upon to argue the case for herself and her father. This she did with such courage, ability, and eloquence, that the late Sir Cresswell Cresswell remarked, that “the perfect and intimate knowledge which she displayed of every single fact—material and immaterial—and the singular tact and dexterity which she showed in managing the case as presented to the court, relieved him from any apprehensions that for want of the assistance of counsel her case

might be presented deficiently before the court." The case was fought out with extraordinary spirit. Not a foot was conceded on either side; but, on the contrary, the mutual recriminations of fraud, forgery, and suppression, gave a painful character to the whole inquiry. The judges who heard the petition were Sir Cresswell Cresswell, Mr. Justice Whitman, and Mr. Justice Williams. The fact of the marriage of 1790 was fully considered, and the court in their judgment gave the first judicial decision upon it. At the conclusion of the reply, the court adjourned for a few minutes, and on their return pronounced judgment against the petitioners—and ordered that the parties cited should be paid their costs. The court was composed of judges of great experience and learning, and of distinguished ability. Their judgments, however—which were not written, but which were delivered extemporaneously—are loose in their argument and language. Sir Cresswell Cresswell manifested a severity which the occasion did not require. He dwelt upon the reasons alleged by the petitioners for the secrecy of the marriage of William Shedden with Ann Wilson. One was because the father of the young lady objected on account of her youth. "But," said that learned judge, "what a strange reason to give for keeping the marriage secret and private. Would the father be more reconciled to his daughter cohabiting with William Shedden because he thought she was not married, or did not know that she was married?" We do not think that a jury bringing their common sense and experience to bear upon this case would have reasoned about that fact in this way—they would probably have thought that the secrecy of the marriage ceremony need only be kept for one day, afterwards to be avowed to the world. The objections of the father were the reason for a secret ceremony—but they were not any reason, and were not put forward as such, for keeping the fact of marriage secret after the marriage ceremony was over. The case for the petitioners was, that this young lady lived with Mr. W. Shedden as his wife—near her

own father's house—and, as such, was introduced to and received by the best society in New York. A considerable portion of Sir Cresswell Cresswell's judgment is made up of comments upon the conduct of the male petitioner. He is accused of giving different reasons for the secrecy of the marriage at different times—of suppression, and even of perjury, with regard to the death-bed letter of November 12th, 1798—and of giving different reasons for the death-bed marriage. The eminence and undoubted honour of the judge do not excuse, in our opinion, the excessive severity of his remarks. But, granting all that he says against Mr. Shedden, the petitioner, to be true, his conduct ought not to influence the conclusion that we may come to about events that took place before that gentleman was born. Independently of Mr. Shedden and his interests, those facts in their absolute verity exist, and we shall not facilitate our getting any positive knowledge about them if we allow the conduct of those who are interested in them to give a bias to the mind. Sir Cresswell Cresswell was not satisfied that a *prima facie* case in favor of the marriage was made out by habit and repute. Even if such a case was made out, he thought that it was fully rebutted by the evidence that was adduced on the other side. He placed every reliance upon the genuineness of the letter of November 12th, and understood it to be admitted by the petitioners, "if that letter was genuine there was an end of their case." He thought that great stress ought to be given to the word "restore," as used in that letter. In 1803, Mr. Hugh Crawford, then conducting, on behalf of the boy, the suit in the Scotch courts, by which Mr. William Patrick, his testamentary guardian, sought to establish his illegitimacy and says, "Mr. Miller communicated to me the judgment of the court. I think it very improbable it will ever be reversed, especially in the House of Lords; for if I do not, the boy may challenge it, William Shedden may challenge it." Sir Cresswell Cresswell explained this letter away, and did not think that it contained evidence to show that

Crawford was not protecting, in good faith, the interests of the boy. The learned judge concluded by commenting upon the long course of persecution to which Mr. William Patrick, "who had lived honoured and respected, with his integrity unimpeached," had been subjected. For ourselves, we have not risen from our long study of this case with the high opinion of this gentleman that the learned judge entertained. Even supposing that the law and the facts too are on his side, it would be hard to say that he has acted with honour, or with a due regard to the sacred trusts which he accepted on behalf of the boy who was left helpless in his hands. Mr. Justice Whitman and Mr. Justice Williams gave short judgments, in which they said that they were led to concur in the judgment of Sir Cresswell Cresswell by the death-bed letter of November 12th. The Shedden case was thus again disposed of for a time. We do not intend to give any opinion of our own upon the judgment of the court, other than is implied in the expression of our satisfaction at the prospect there now is that all the law and all the facts of this complicated case are again to receive a new judicial investigation.

Since the adverse judgment of November 27th, 1860, the petitioners have been engaged in prosecuting appeals to the House of Lords. In the appeal against the judgment itself, the appellants pray that the male petitioner should be declared legitimate, or that the case should be remitted to the court below, with the direction that the issues of fact shall be tried by a jury. They allege that the decree of the court below was against the weight of evidence, and that the marriage of 1790, between William Shedden and Miss Ann Wilson according to the law of New York was clearly proved. They say that the letter of November 12th, 1798, was not proved to be genuine; that evidence adduced by the respondents was improperly admitted, and evidence adduced by appellants improperly rejected, and that new and material evidence has been discovered since the trial. On February 8th, 1861, Miss Shedden moved the full Court for Divorce and Matrimonial

Causes for a new trial on various grounds. It was part of the application that the new trial should be had before a jury. Judgment was ultimately given on the 24th January, 1862, by the court rejecting the application. Against this judgment there is also a supplemental appeal to the House of Lords. Much complication and very considerable delay have been occasioned by alleged mutilations of documents by the respondents since the trial. It is said the ship marks which were upon the letter of November 12th, 1798, have been tampered with—on account of discoveries known to have been made by the appellants which went to show that the supposed original of that letter and the duplicate or triplicate must have been sent home in the same ship, or that the original letter having come in one ship, the duplicate and triplicate had come together in the other, contrary to all mercantile practice. We understand that a noble lord is going to move for a Committee of Inquiry into the alleged tampering with the documents in evidence in the cause, on the ground that such conduct is a breach of privilege, and is in contempt of the House.

In the appeals and in the appendices to them, the appellants make out a strong case against the genuineness of the letter of November 12th, 1798, upon which the court below virtually based their decision. They urge, that even if genuine it is not conclusive against them. Even supposing that that letter was written under the partial authority of William Shedden, it was written under such circumstances that it may well be looked upon with suspicion. John Patrick was there, the originator of the whole plot, and his uncle was in the very agony of death. He was declared to be so ill that he could not turn in his bed, and on the day following he died. The letter is said to have the style of John Patrick, and even if William Shedden gave it some sanction, it must not be supposed that he was able to weigh the effect of the words that were used in it.

Apart altogether from the proceedings of Mr. Shedden, the petitioner, the whole question will receive another judicial

investigation by means of a petition just presented under the Legitimacy Declaration Act, by his sister Jean Ralston Shedden. This lady, as we have already observed, was born in 1792, and was the daughter of William Shedden and Ann Wilson. She will be in no respect prejudiced by the proceedings that have taken place in this country in connection with her brother's claims. She has a right to have the matters of fact inquired into by a jury in her own interest, and this we believe Sir J. P. Wilde has ordered to be done.

There is, therefore, no prospect at present of the Shedden case disappearing from public attention. In the remarks that we have made about it, we have confined our attention to the evidence with reference to the existence of the alleged marriage of 1790. There are other momentous issues between the parties, such as the manufacture of false debts, rights of property, fraudulent conspiracy, and abstruse questions of international law. It may be now, that after the lapse of so many years, the petitioners are only fighting for a barren honour, but one that their long struggle shows they prize more than any other consideration whatever. After the imputations that have been made, we fear that there is no hope of any compromise or settlement between the parties. William Patrick is now dead, but his representatives have taken up his cause, and the battle is fought with continued pertinacity on both sides. But a compromise would be considered by the public as the best settlement of this long litigation. The Patrick family are now said to be wealthy and powerful, but they are so through the dishonour of the children of William Shedden, whose property they have since enjoyed. We will grant for the moment that in law they are right. But how stand they in honour? William Shedden, a brave man, an affectionate kinsman and father, dying out in New York, expressed at all events in the agony of his death, one earnest desire that his son, whom now, as they admit, he thought he had legitimatised, should succeed to his estate and name. He committed this son to the charge of William Patrick, and before

that son attains the age of 21, the House of Lords, at the instance of William Patrick, has pronounced him illegitimate, and William Patrick himself has become the possessor of his property. Surely this is a litigation which many would be glad to see end by honourable compromise based upon the assumption of the marriage of William Shedden, upon the death-bed wish that he expressed, and upon the sacred trusts that he imposed. But such a result after all that has passed we cannot hope. This litigation must go on for years, and we trust it will go on, until all are satisfied that at length the absolute truth has been ascertained.

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#### ART. X.—MARRIAGES OF BRITISH SUBJECTS IN FOREIGN COUNTRIES.

**A** MARRIAGE to be valid must be in conformity not only with the law of the domicile but also with the *lex loci*, the law of the domicile determining the capacity of the parties, the *lex loci* the form of the contract.

With reference to the form of the contract, Lord Stowell lays it down that the “safest course is always to comply with the *lex loci*,” from which nothing short of absolute necessity will warrant a deviation.

When a necessity for deviation from the *lex loci* is shewn (as in the case of a marriage by British subjects in a heathen country, where they are compelled to follow their own law), the marriage will be deemed valid, not only in the courts of this country but in foreign courts, on the principles of comity or international jurisprudence: so says Lord Stowell.

According to Lord Stowell’s reasoning, it may be questioned whether marriages by British subjects in the chapels of our ambassadors abroad would be recognised as valid in *foreign countries*. There is no necessity which compels a resort to the chapels of our ambassadors in France or Prussia.. Those

countries have ambassadors in London, but they provide no accommodation for the marriages of such of their subjects as happen to be here.

It would appear that the marriages of British subjects in the chapel of our ambassador at Paris are regarded by French lawyers as invalid. They say there can be no good marriage in France except before the civil officer, and as the French comply with our law when here, they expect us to comply with their law when we happen to be in France.

Marriages of the description now referred to are unrecognized in foreign countries, their recognition being a peculiarity of English, or British jurisprudence. International law does not countenance them. The case of *Este v. Smith*\* shews this, for there not one text of international law was cited, though much required. Lord Stowell, moreover, speaks doubtfully of the supposed privilege of ambassador's chapels, saying it had not received "judicial sanction."†

Then as to what are called *consular marriages*. They seem to have no sanction from international law. Consuls have no diplomatic privileges.

Foreign consuls in this country have no arrangements for marriages.

As to marriages by British subjects in foreign *factories*, they seem to have fallen into disuetude. They are evidently subject to the observations of Lord Stowell.

Necessity will justify them and render them acceptable not only at home but abroad.

In *Ruding v. Smith*, Lord Stowell held good a marriage entered into at the Cape of Good Hope by an English couple according to the forms of the Church of England, although contrary to the *lex loci*; but this was expressly on the ground of what he called insuperable difficulties, which compelled the parties to act on their own law. The difficulties which Lord Stowell deemed "insuperable," arose from the fact that the Cape of Good Hope was, at the time, occupied by British forces under

\* 18 Beav. 112.

† *Ruding v. Smith*, 383.



capitulation. He therefore dismissed a suit brought for nullity, treating the marriage as valid not only by the law of England but by the law of nations.

A marriage of British subjects will be deemed valid though in disconformity with the *lex loci*, when contracted on board a British man-of-war on a foreign station. According to Lord Stowell's principle it would seem, in such a case, that necessity must exist, and must be shown.

The whole of this subject is under the consideration of the Marriage Laws' Commissioners, who, we trust, will recommend the establishment of an international uniform system whereby strangers in foreign countries may be at liberty to marry according to their own law so long as their original domicile continues. This, no doubt, would be at variance with Lord Stowell's doctrines, and indeed with the ordinary current of decisions and judicial dicta. But the question is one of policy and expediency. Is it not desirable that the solemn contract of marriage should be entered into in a manner calculated to awaken reverence? Education and habit should be attended to. Protestants should be allowed to marry according to their own forms when they happen to be in Roman Catholic countries, and Roman Catholics should have the same privilege in Protestant countries.

Of course, after a domicile has been acquired in a foreign state, the rules of such foreign state must govern. It is only in the case of strangers, who, though accidentally in a foreign country have the means of marrying in conformity with the law of their domicile, that we should recommend the universal recognition of marriages so contracted. But the objects which we thus advocate could only be attained by international negotiation and convention.

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## Notices of New Books.

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[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**On Parliamentary Government in England: its Origin, Development, and Practical Operation.** By Alpheus Todd, Librarian to the Legislative Assembly of Canada. In two volumes. Vol. I. London: Longman and Co. 1867.

THIS work is full of valuable information, although we do not agree with all the views of the author. With respect to the probable results of democratic reform, we think Mr. Todd is rather too much of an alarmist. The new system, will no doubt, modify in some respects the working of parliamentary government in this country, but we do not believe that it will endanger the whole fabric of society of the empire. On the subject of martial law also, we think that Mr. Todd has taken up an erroneous view. He has been so far misled as to quote Mr. Finlason as an authority. This shows the disadvantage which an author, writing in a distant colony, labours under, notwithstanding all his research and industry. These and other blemishes, however, do not detract greatly from the substantial merits of Mr. Todd's work, which is intended to expound the system of parliamentary government as administered in England. The treatise may be considered as occupying a sort of midway position between Sir Erskine May's *Law of Parliament* and his *Constitutional History*. After an historical introduction, the author deals with the sovereign and the royal prerogative in connection with parliament. In the next volume, which is now passing through the press, he will treat of the cabinet council, the members of the administration, the administration in parliament, and proceedings in parliament against judges for misconduct in office. There can be no doubt as to the great ability and research which the present volume shows; and we can confidently predict that when completed the work will form a most important contribution to constitutional history and law. Our present remarks are intended to be merely provisional, and we shall feel bound to devote an article to Mr. Todd's work when the second volume has appeared.

**Inventors and Inventions.** By Henry Dircks, C.E., &c. London: E. & F. N. Spon, 48, Charing Cross, 1867.

THIS is the work of an able man and a well-known inventor; it is full of suggestive matter, and will well repay careful study, and if we

do not always agree in the conclusion drawn by the author, it is with considerable diffidence that we venture to disagree with him. An experience of thirty years, and a well-balanced mind and great experience entitle his opinions to great weight. We must content ourselves rather with analysis than criticism, and indeed the space at our disposal is so limited that we cannot do justice to the merits of Mr. Dirck's small volume, which is divided into three sections. 1. The Philosophy of Invention; 2. The Rights and Wrongs of Inventors; and 3. Early Inventors and Secret Inventions from the 13th to the 17th century. Among the propositions laid down by the author, we note first, the IDEAL is more frequently *wrong* than otherwise; and secondly, the PRACTICAL is inevitably *right*. He draws a great distinction between the public and the public: the former as seen by lawyers and manufacturers, who declare patents to be a tax on their public; that is, so far as manufacturers are concerned themselves, and the public generally, who derive a benefit for patents, because they lower prices and enlarge the sphere of trade. The manufacturer, therefore, is a great discourager of patents, because he is already supplied with machinery, &c., and a new patent obliges him as "a trade necessity" to get new and better, not on principle, for they view the royalty they have to pay as a tax, and the new machinery as so much money taken from their profits; and these would only be adopted, because of the competition which patents place in the power of smaller capitalists. There are some most admirable remarks on the distinction between discovery and invention and suggestions, which are merely ideas and opinions as distinguished for inventions, most aptly illustrated by the discussion in 1862-3, between Mr. Nasmyth and Captain Palliser, as to the priority in the application of chilled iron for purpose of making projectiles to penetrate armour plates. Mr. Dircks says no patent is of much value until it has sustained the expenses of a heavy Chancery suit. A fortune, he says, is often spent in law, which would not occur under any system with a semblance of justice in it. The author suggests as an amendment on the present—a course of examination—the graduation of patents; examination after the lapse of some time, in order to decide the right of the patent to being continued or annulled. He asks "Why not make patent grants of progressively ascertainable value?" Why not allow them to pass an ordeal before being fully and completely granted; to be subject to an income-tax on their produce; and afterwards the patent to be indefeasible? We heartily commend this volume, to which we have done scant justice, as one amply repaying any care bestowed on its study.

The Institutes of the Roman Law. Part I. By Frederick Tomkins, M.A., D.C.L., Barrister-at-Law. London. Butterworths. 1867.

THIS work promises to be an important and valuable contribution to the study of the Roman law. The present part contains an account of the sources of that law from the earliest times of its history until the breaking up of the Western Empire. We always welcome any

attempt to explain the history and nature of the civil law, on the part of an English lawyer in the hope that in course of time the national neglect of it, which has produced more evils than many persons suppose, may no longer be a reproach to us among the jurists of other nations. The object of this short notice is only to call attention to the publication: we look forward to giving a more extended review of it on an early opportunity.

**An Inquiry into the Legal History of the Supremacy of the Crown in Matters of Religion, read at the visitation of the Archdeaconry of London, May 29th, 1867. By W. H. Hale, M.A., Archdeacon of London. London: Butterworths. 1867.**

At the close of his charge the Archdeacon of London, says:—

“The purport for which the foregoing pages were compiled, had reference to the condition of the Anglican Church, rather abroad than at home, and to the assertion of a principle of the English Constitution—the authority and duty of the sovereign to govern the clergy of the Church of England throughout the Empire.”

We quote this to show the general view taken by Archdeacon Hale and the object of his volume. With regard to the manner in which that view is presented, we must own that while we cannot compliment the greater number of the clergy, who say their say upon the question of their royal supremacy in matters of religion, upon their moderation, their logic, or their appreciation of history, the Archdeacon of London has shewn that he possesses not only all these, but a legal mind in the good sense of the term. We have, therefore, thought it right to bring it before the attention of lawyers, who, if there be any such, entertain any doubt upon the historical side of this constitutional question, and we congratulate the clergy of the Archdeaconry of London upon having had the subject put before them for once in a rational and temperate manner.

**Prize Law: particularly with reference to the Duties and Obligations of Belligerents and Neutrals. By Professor Katchenovsky, of the University of Kharkov, Russia. Translated from the Russian by Frederic Thomas Pratt, D.C.L., Advocate. London: Stevens and Son. 1867.**

At this time, when the state of knowledge and opinion of Russia upon all the questions of international law are becoming daily more and more important, it is more than merely interesting to see that this great part of politics is not neglected there. It appears that professorships of international law have been established by the government in the universities of the Empire, and that the author of this work holds that which has been established in the University of Kharkov. As it is not the object of this short notice to discuss the subject of the book, but only to give an idea of the manner in which that subject is

treated, and the nature of the matter treated of, it need only be said here that the volume, which is a small one, contains in a very clear and concise form the whole history of its subject, with the various opinions that have been entertained concerning it, from the 12th century to the year 1866. The author is one whose views are of that school which leans towards justice and right as the true principle of international law, and not political expediency, and though he states this view sometimes too broadly and too much like the theoretical jurist, and not sufficiently like the statesman or practical lawyer, the tone of his work cannot fail to enlist the sympathies of and afford arguments to all those, of whatever school they may be, who wish the whole subject of maritime war to be understood, and, if possible, placed upon some generally accepted principles, whether they be of abstract justice, or that rough and practical justice with only which we, for our part, think that the world must needs be content. In conclusion, we would recommend this volume to the general student of international law, and, above all, to those who wish to know something of the state of the science in Russia, as the author writes professedly from a Russian point of view. Not being acquainted with the language of the original, we offer no opinion as to the merit of the translation, save that the name of translator leads us to accept it with all confidence.

**The Law of Railways.** By Isaac F. Redfield, LL.D., Chief Justice of Vermont. Third Edition. Boston : Little, Brown, & Co. 1867.

THESE four larger volumes, though of course written professedly for the guidance of American lawyers, will be found highly useful, both for reference and for the right understanding of the principles on which cases upon the subject of traffic are decided, for English lawyers also. The whole work is most complete and elaborate, and the care and skill with which it has been prepared are worthy of the highest praise.

**A Treatise on the Law of Mines and Minerals.** By William Bainbridge, F.G.S., Barrister-at-Law. Third Edition. London : Butterworths.

WHEN a law book has reached three editions, criticism as to its practical value is superfluous. We believe that this was the first book that was published in England on the special subject of Mining Law. Others have been since published, but we see no reason, in looking at the volume before us, to believe that it has been yet superseded.

**Questions for a Reformed Parliament.** London : Macmillan and Co. 1867.

THIS work, touching as it does upon most of the great questions that interest England at the present time, and written as it is by men

whose words upon those subjects must carry weight, demands a full and careful review. This review we had intended to give in the present number of the *Law Magazine*, but as that was found impracticable we have been compelled to defer it until the next, when we hope to notice it with the care and completeness that it deserves.

The American Law Review. Nos. I and II. Boston: Little, Brown, and Co.

We have great pleasure in noticing the first two numbers of the *American Law Review*, which appeared first in January last, and wish that space would allow us to notice fully their most able and interesting contents. Among the articles more interesting to English readers, we may mention, in the April number, those on the Law of Sales, on Chief Justice Marshall, whose reputation is by no means confined to his own country. The testimony of persons accused of crime, and an amusing and interesting one on Law in Romance. In the January number one on Luther Martin, who, unlike Chief Justice Marshall, is well-nigh forgotten, though worth remembering; and, to those interested in American politics, one entitled "Theories of Reconstruction." Each number contains also a digest of cases decided both in the Supreme Court and in the English Courts.

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*Books Received.*

The Law of the Building of Churches, Parsonages, and Schools. By Charles Francis Trower, Esq., M.A., Barrister-at-Law. Butterworths. 1867.

The Second Table of the Commandments. By David Rowland. London: Longmans. 1867.

The Journal of Jurisprudence. Edinburgh: July. 1867.

The Upper Canada Law Journal. Toronto.

The Lower Canada Law Journal. Montreal.

The Local Courts and Municipal Gazette. Toronto.

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## Events of the Quarter, &c.

### COUNCIL OF LAW REPORTING.

In the following Report of the Council of Law Reporting—which is its first—will be found a general statement of the difficulties and obstacles which have been finally overcome by the issue and success of the *New Law Reports*.

“The Council of Law Reporting, in submitting their First Report, have much satisfaction in being able to state that their proceedings hitherto have been attended with success greatly beyond what was anticipated at the outset. In the endeavour to establish a set of Reports to be prepared and published solely in the interest of the profession and the public, and without any regard to private advantage or commercial profit, it was to be expected that many difficulties would have to be encountered. The novelty of such a design was, with some, an objection which impeded all consideration of its merits; others disbelieved that such a work could be undertaken without a latent expectation of private gain, which time would soon expose; while the resistance of those whose commercial interests would be prejudiced by its success, combined with these and other elements of opposition, to create an array of difficulties which could only be surmounted by resolute perseverance in the endeavour to accomplish a work believed to be of great public utility. The Council having the Bar Scheme for their guide, have found in a liberal interpretation of its provisions a comparatively easy solution of the chief difficulties they have had to encounter; and they desire to attribute, to a great extent, the amount of support and confidence which they have from the first received, and still continue to receive, from the judges, the Bar, and the profession at large, to the judicious and practical suggestions embodied in that scheme—the result of the assiduous and disinterested labours of the Bar Committee, continued for a period of six months, during the busiest part of the legal year.

“A short statement of facts, many of them already known, will serve to explain the difficulties encountered and the progress effected.

“The first step required by the Bar Scheme was to secure the concurrence of the Inns of Court and the Incorporated Law Society in the formation of the Council, as a body representing the interests of the various branches of the profession, to which the control and management of the undertaking was to be entrusted. Endeavours were at once made to attain this object. The law officers of the Crown, who were proposed as ex-officio members, have from the first, and throughout the several changes which have since occurred in the distinguished individuals filling those high offices, given their willing

and powerful support to the Council, by identifying themselves with its proceedings and, when occasion required, assisting by attendance and advice. The Honourable Societies of Lincoln's Inn, the Inner Temple, and the Middle Temple, and the Incorporated Law Society, readily consented to concur, and at once appointed the proposed number of representatives; but Serjeants' Inn and Gray's Inn, for reasons of prudence and delicacy, at first declined co-operation. It is, however, gratifying to be enabled to state, that recently both those learned societies, having had the opportunity of witnessing the proceedings of the Council, the manner in which the undertaking has been conducted, and the amount of support it was receiving from the profession, have signified their adhesion to the scheme, and appointed representatives to the Council; thus completing the proper constitution of the body of individuals to whose management and control it had been proposed to entrust the preparation and publication of the Reports of the judicial decisions in our superior courts, which constitute the Case Law of this country. It only now remains to obtain for this body at a proper and convenient season a Charter of Incorporation, as suggested by the Bar Scheme, the grant of which the Council hope the Lord Chancellor and others in authority may deem it for the public interest to sanction and facilitate.

"As the Reports to be established were intended to be self-supporting, the attention of the Council was first directed to laying the foundation of prudent financial arrangements, and in these they found useful suggestions in the Bar Scheme. Having failed to receive—and they could not reasonably expect to receive—any encouragement or support from the law publishers, whose interests were supposed to be bound up in a system of law reporting which it was the object of the Bar Scheme, in the interest of the public, entirely to change, the Council were left at liberty to entertain a proposal which was made to them by the old-established printing firm of Messrs. W. Clowes and Sons, to undertake the printing, publication, and distribution of the Reports upon terms which absolved the Council from all pecuniary liability, while it left to them the receipt and application of all moneys paid for subscriptions. This proposal was carefully considered; and in the discussion and settlement of its terms the Council were met by Messrs. Clowes in a spirit of prudent liberality, which they desire to take this opportunity of acknowledging. And the experience which the profession have now for eighteen months had of the manner in which Messrs. Clowes have done their part in producing a work which, as regards paper, type, printing, style, and general regularity of publication and distribution, is almost all that could be desired, induces the Council to believe that their acceptance of Messrs. Clowes' proposal was not only justifiable but judicious.

"The basis of financial arrangements being thus laid in the contract with Messrs. Clowes, the next step to be taken by the Council was the selection of the editors and reporters. In this the Council followed, both in letter and spirit, the provisions of the Bar Scheme, by offering an appointment to every member of the Bar who was then engaged as reporter in the fourteen then existing series of authorized Reports.



With only three exceptions, the offer was accepted in a spirit of generous confidence.

"It was with great regret that the Council met with refusals from Mr. Beavan, in the Rolls Court, Messrs. Best and Smith, in the Court of Queen's Bench, and Messrs. Hurlstone and Coltman, in the Court of Exchequer: and although the Council had no right or desire to endeavour to control the conduct of gentlemen who were the sole judges of what was best for their own interests, they nevertheless thought that they were only properly endeavouring to promote the public beneficial object of the Bar Scheme in attempting, by personal communications and explanations, to remove objections and obtain assent. That these attempts failed, the Council at the time regretted; and, so far as the subsequent success of the scheme may have been productive of loss to any individual dissentient, their regret remains. Upon the appointment of Mr. Beavan, in June, 1866, to the office of Examiner in the Court of Chancery, His Lordship the Master of the Rolls immediately communicated his unsolicited approval of the reporters who had been appointed by the Council to the Rolls Court—an approval which His Lordship was pleased to state had been withheld only out of a due regard to the interests of Mr. Beavan. Thus, with the exception of completing arrears, the profession will for the future be relieved from the unnecessary burden of a separate series of authorized Reports for the Rolls Court. At the commencement of the present year the series of Reports in the Exchequer, furnished by Messrs. Hurlstone and Coltman, ceased of their own accord, and at the same time an attempt which had been made to establish a separate series of Reports in the Common Pleas by Messrs. Harrison and Rutherford in lieu of the series of Common Bench Reports—which, by the acceptance of Mr. Scott of an appointment under the Council, had merged in the Law Reports—was discontinued, and the result is that out of fourteen separate sets of authorized Reports, which existed up to the end of Trinity Vacation, 1865, one only now remains—that of Messrs. Best and Smith, in the Queen's Bench; and the Council feel they are but giving utterance to the wishes of the profession in expressing a hope that some opportunity may soon present itself for effecting, upon satisfactory terms, a fusion of that series with the Law Reports. And here it may not be out of place to observe that out of the four Weekly Serial Reports which previously existed, the *New Reports* were abandoned early in the year 1866, and that at the beginning of the present year, 1867, the *Jurist* and its reports ceased to be published. Of this last work, conducted as it had been for nearly thirty years with ability and spirit, the Council would desire to express their regret that the voluntary sacrifice of a work which had rendered such good service to the profession should have been preferred and resolutely effected without any communication with them.

"Despite the disappointment occasioned by the few refusals they received, the Council had little difficulty in completing their selection of the gentlemen, whose names are familiar to the profession as editors, secretary, and reporters. In this selection the Council were

free from the usual embarrassments of patronage, and they believe that the services of those gentlemen, as hitherto rendered, while inviting the sharp but candid criticism of the profession, have secured no ungrudging expression of its general satisfaction and approval. To Sir Fitzroy Kelly, who filled the office of Chairman of the Council from the commencement until his elevation to the bench as Chief Baron of the Court of Exchequer, the warmest acknowledgments are due for the unremitting attention and fostering advocacy with which from the first and throughout he has promoted the scheme, and for the interest with which he still regards it. The Council bear constantly in mind the provision of the Bar Scheme, which empowers them, if they deem it desirable, to make arrangements for the discontinuance of any existing series of reports, by compensation out of surplus profits; and it would be a satisfaction to them to exercise that power, if a fitting opportunity should arise, with the full consent of the parties to be affected by it. But the judgment and wishes of the profession, as manifested by the support awarded to the Council, are the best, if not the only means, by which any such results could be accomplished.

"The subscribers for the year 1866 exceeded 4,000 in number; and the ready adhesion of so many members of the profession, dispersed throughout the United Kingdom, India, the Colonies, and even the United States of America, may be accepted as evidence that the system of reporting proposed by the Bar Scheme, was adapted to supply a real want of the profession and the public, and that the arrangements of the Council have been on the whole satisfactory.

"The amount of subscriptions having doubled the estimate suggested by the Bar Scheme, the Council felt themselves justified in at once giving effect to the suggestion of the scheme for the establishment of a weekly, in addition to the monthly series. And with this view they established the *Weekly Notes*, which were and are intended only to inform the profession of the current decisions of the Courts; and being necessarily prepared in haste, and without the opportunity of correction by careful reference to papers, and without judicial revision, are not intended or adapted for citation as authority, though useful for information. In further addition to the *Weekly Notes* the Council have also supplied, under a special arrangement with the Queen's printers, an authorized edition of the *Statutes*, which are published in parts quickly after the passing of the Acts. And thus the Council have been enabled to apply the funds hitherto liberally supplied by the profession in furnishing for the prepaid annual subscription of five guineas a complete body of the Case Law and Statute Law of the year; the Statute Law in an authorised form, receivable as evidence in all courts and places; the Case Law in a form which, possessing the advantages to a greater extent, than ever heretofore realised, of skilful preparation, careful editing, and judicial revision, is calculated to acquire and maintain its recognition by the judges, the Bar, and the entire profession, as the standard of authority.

"The Council, however, beg to remind the profession that the continued success of the undertaking thus far secured depends entirely

upon their voluntary approval and support; and as the Council have not hitherto felt themselves justified in applying the funds entrusted to them in expensive advertisements, and employ no agents to canvass for or collect subscriptions, they hope that each subscriber will feel it for his interest to support them by seasonable advocacy of the scheme amongst his professional brethren, by the friendly communication of whatever errors or deficiencies he may discover, and of well-considered suggestions for amendment—so that the work may continue to be conducted in the spirit in which it has been commenced, as a work of public utility, tending to the improvement of the law and the advancement of the administration of justice.

“The accounts for the year ending the 31st of December, 1866, have been duly audited; and after taking credit for the stock on hand, at the subscription price, the expenses of the year, including the additional cost of the *Weekly Notes* and the *Statutes*, and payment in full of the salaries of the editors, secretary, and reporters, have been met. The number of copies printed of the *Law Reports* and *Statutes* for 1866 was 5,000; of these some copies still remain on hand. But the *Weekly Notes* are out of print. And although subscriptions for the year 1866 are still being accepted by the Council, so that the remaining numbers on hand may ere long be exhausted, the Council have no intention at present of increasing the subscription for those numbers.

“June 17, 1867.”

#### THE LIMITED LIABILITY ACTS.

THE Select Committee appointed to inquire into the operation of the Limited Liability Acts have agreed to report the following resolutions to Parliament:—

“That all companies should hold a general meeting of shareholders within four months of the date of the registration of the company. That the companies hereafter to be formed may, by the memorandum of association, and companies already formed may, by special resolution, agree to carry on business on the terms that certain shareholders thereof may be responsible to the extent of the whole of their means, whilst the rest of the members of the company are liable only to the extent of the shares held by them; such companies, nevertheless, to continue to be called “Limited.” That companies may, if they think fit, have a portion of their shares paid up in full, the remainder not being so paid up. That as regards all shares paid up in full, it shall be competent for companies, if they think fit, to issue certificates to bearer, so that the shares may be transferable by delivery. That the seller of shares may claim a registration of the shares into the name of the buyer, upon producing an acceptance of those shares signed by the buyer. That the law concerning the mode of contracting, so as to bind companies by their agents, should be amended by introducing clause 41 of 19 & 20 Vict. c. 47. That the court before which a petition for winding-up shall be brought shall have power to refer the simpler

cases of liquidation to such county courts as it may direct under the order of the said court. That a petition to the court to wind-up a company, if presented by shareholders, should be signed by one or more shareholders who are either original allottees of shares, or whose names have been on the register as shareholders for a period of not less than six months. The companies should be allowed to reduce their capital, or to reduce the amount of their shares, or to reduce both their capital and their shares, on the following conditions:—Notice shall be given to the registrar of Joint-Stock Companies. Notice shall be given by advertisement or otherwise in such manner as the Board of Trade may direct. That the consent of all parties, being creditors of the company at the date of the reduction, be obtained; or that the claims of such creditor be discharged; or that in cases of the absence or legal incapacity of creditors, that the amount in cash, of their claims, be invested in Government securities, or placed in the Bank of England in the names of trustees, under conditions to be approved by the Board of Trade. That it is highly desirable that a Bill should be brought in by the Government in the present session, to carry out the alterations of the law proposed in the foregoing resolutions."

#### MARTIAL LAW.

THE Secretary of State for the Colonies, the Earl of Carnarvon, has thought it advisable to communicate to colonial governors for their information, and if necessary for their guidance, the following extract of a despatch addressed by him to the Governor of Antigua, in which he stated the views of Her Majesty's Government on this subject of martial law:—

"An enactment which purports to invest the Executive Government with a permanent power of suspending the ordinary law of the colony, of removing the known safeguards of life and property, and of legalising in advance such measures as may be deemed conducive to the establishment of order by the military officer charged with the suppression of disturbances, is, I need hardly say, entirely at variance with the spirit of English law. If its existence can in any case be justified, it can only be because there exists such a state of established insecurity as renders it necessary for the safety and confidence of the well disposed, that, in times of national emergency, the government should possess this extraordinary facility for the suppression of armed rebellion. But whatever apprehensions or disturbances may exist in any of Her Majesty's colonies, it is certain that no such chronic insecurity prevails in any of them, and in no colony, therefore, should the power given by the present law to the Governor of Antigua be suffered to continue.

"I think it therefore necessary to repeat the instructions given by my predecessor to Colonel Hill, and to request that you will cause to be submitted to the Legislature an Act repealing so much of the law as authorises the proclamation of martial law.

"I have only to add, that in giving you these instructions, Her

Majesty's Government must not be supposed to convey an absolute prohibition of all recourse to martial law under the stress of great emergencies, and in anticipation of an Act of indemnity. The justification, however, of such a step must rest on the pressure of the moment, and the governor cannot by any instructions be relieved from the obligation of deciding for himself, under that pressure, whether the responsibility of proclaiming martial is or is not greater than that of refraining from doing so."

#### DIGEST OF THE LAW.

HER Majesty's Commissioners, appointed "to inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions," have made their first report.

The Commissioners, after expressing what they understand by the term "law," as stated in the reference, described the serious evils which arise from the extent and variety of the materials from which the existing law has to be ascertained, and are of opinion that a digest, correctly framed, and revised from time to time, would go far to remedy these evils by bringing the mass of the law within a moderate compass, and giving order and method to the constituent parts.

The Commissioners then give their reasons for thinking why a digest would be beneficial, and in what way it would be of advantage to the profession and the public. Having shown the expediency of such an undertaking, they proceed to report as follows :—

"We do not desire to conceal that the task of forming such a digest as we contemplate would necessarily require a considerable expenditure of time and money, though we are strongly of opinion that the benefits that would result from it would amply compensate for any such expenditure.

"We think it clear that a work of this nature (regard being had especially to the importance of its carrying with it the greatest weight) could not be accomplished by private enterprise, and that it must be executed by public authority and at the national expense.

"With respect to the means of accomplishing it we have considered various plans. Any plan must, we think, involve the appointment of a commission or body for executing or superintending the execution of the work. It is obvious that, whatever arrangement is adopted, a certain number of functionaries must be employed, at a high remuneration, in the capacity of commissioners, assistant-commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the legal profession, employed from time to time in the preparation of the materials to be ultimately moulded into form by or under the immediate supervision of the commission or responsible body.

"We are anxious to avoid any recommendation that would involve

the necessity of immediate outlay on a large scale ; and we therefore recommend that a portion of the digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared before your Majesty's Government is committed to an expenditure which will be considerable, and which, when once begun, must continue for several years, if it is to be at all efficacious.

"We are not authorised, by the terms of your Majesty's Commission, to undertake the execution or direction of such a work, but we are of opinion that it might be conveniently executed under our superintendence.

"If this should be your Majesty's pleasure, we humbly submit that the necessary powers should be conferred on us to enable us to carry this recommendation into effect, and that means should be furnished to us of employing adequate professional assistance for this purpose.

"In the progress of the work thus done, light will be thrown on the question of the best organisation of the body to be constituted for the completion of the digest. A fair estimate will be formed of the time that will be required for the whole. Difficulties, not now foreseen in detail, will doubtless be encountered, and the best way to overcome them will be ascertained. The solution of questions which have already occurred to us will be attained, or at any rate promoted. Some of these questions are the following—what is the best mode of dealing with statute law in the digest ? How should conflicting rules of law (if any) and doubts which have been authoritatively raised respecting particular cases or doctrines of law be treated ; and what provision should be made on the important point of the nature and extent of the authority which the digest should have in the courts, and how that authority can best be conferred on it.

"We propose, in this our first report, to limit ourselves to the conclusions and recommendations we have now stated. The consideration of other questions arising from the terms of your Majesty's Commission, and a fuller treatment of some of the subjects here adverted to, we reserve for subsequent reports."

#### THE OATHS COMMISSION.

THE report of the Oaths Commission has been published. Dividing oaths into two classes, those taken for the ascertainment of facts and those taken on admission to certain offices, the report recommends that oaths for the first order should be retained, all possible care being taken to render the mode of their administration as solemn as possible. As to the second class of oaths, the recommendations are as follows :—Oaths of general allegiance to the Sovereign ought to be retained in the case of admission to all great national offices of trust or importance ; but in every such case the oath should be made as precise and exact as possible, and should bind him who takes it to allegiance to Her Majesty and her successors, without entering into historical declarations as to the line of that succession. Oaths of fidelity should be retained in the case of judges of the superior courts,

and in the case of jurymen ; and all other oaths of fidelity should be either abolished or changed into declarations. In substituting declarations for oaths, it is recommended that there be removed from them all promises which are no longer applicable to the present discharge of the duties of the office. The report recommends the abolition of oaths and declarations, such as that taken by the Lord Lieutenant and Lord Chancellor of Ireland, which have been framed to exclude from office men of certain religious opinions. The same principle applies to the declaration of conformity to the Liturgy of the Church of England, required by the Act of Uniformity to be taken in the case of headships and fellowships of colleges. The oaths taken by recruits on their enlistment into Her Majesty's army, and generally those taken under the rules of Her Majesty's service, should be retained, with the changes suggested. The Commissioners believe that if the oaths taken by soldiers were administered with circumstances calculated to impress upon them the solemnity of the engagement which they then contract, it would tend to quicken and maintain their loyalty. The report is signed by five of the nine Commissioners—the Duke of Richmond, Bishop of Oxford, Mr. Russell Gurney, Q.C., Mr. Justice Shee, and Mr. Myles O'Reilly, M.P. Of the nine, four add dissents. The Duke of Richmond, Bishop of Oxford, and Mr. O'Reilly object to the substitution of declarations for oaths of fidelity. The Duke of Richmond, Bishop of Oxford, and Mr. Russell Gurney desire that the declaration of conformity to the Liturgy required to be taken in the case of headships and fellowships in colleges should be retained. The following also dissent :—Lord Lyveden, Mr. E. P. Bouverie, M.P., Mr. R. Lowe, M.P., Sir W. Stirling Maxwell, and Dean Milman—and say that by far the greater number of oaths ought to be wholly abolished, and the rest changed into some convenient and distinct form of declaration, for breach of which a penalty should be imposed. Mr. Dunlop, M.P., while concurring generally in the third dissent, deprecates the omission from the oaths of allegiance of all reference to the Act of Settlement.

#### THE LATE LORD JUSTICE TURNER.

The Lord Chancellor, on taking his seat on the bench on the Tuesday following the decease of the above learned judge, said with emotion :—

“I am sure the Bar will deeply regret the loss which the public and the Profession have sustained in the death of that most excellent man and upright judge, Lord Justice Turner. The unvarying kindness and courtesy which he showed to the profession, his devoted application to every case that was brought before him, the anxious care with which he worked out all his judgments, which were always full and satisfactory, can never be forgotten ; and I am quite sure that there is hardly anyone connected with the Court of Chancery, who will not feel that he has lost almost a personal friend in this most amiable and esteemed man, and upright and conscientious judge.”

A few days after, Lord Justice Cairns added to this graceful tribute to the memory of the late Lord Justice, in presence of a crowded court, as follows, upon Lord Justice Rolt taking his seat on the bench :—

"It is impossible for me to resume my sittings here, after the temporary adjournment of the court, without reverting to the great loss which the public have sustained, and which in particular those of the legal profession have sustained who are engaged in the administration of justice, in the death of the late Lord Justice Turner. Those of you who for a long course of years have had an opportunity of watching his career, could not fail to have observed with increasing clearness, the admirable qualities of his heart and mind ; and, therefore, any words from me with regard to him, must fail to express what we all feel at his loss. But we may well desire to put on record for the eyes of others to see and read, that we are deeply sensible that there has been taken from us, still in the full vigour of judicial exertion, and the faithful and courteous discharge of his functions, one whose place it will be indeed difficult to fill, and who has left behind him a reputation with which ambition might well be satisfied, that of a man beloved, respected, mourned by all who came in contact with him."

The late Lord Justice, senior Lord Justice of the Court of Appeal in Chancery, was born on the 5th February, 1798, and died on the 9th of July. He was the ninth son of the late Rev. Dr. Turner, Incumbent of Great Yarmouth, and was educated at the Charterhouse, whence he proceeded to Pembroke College, Cambridge, and graduated B.A. as ninth wrangler, in 1819 ; he was soon afterwards elected a Fellow of his college, and took his degree of M.A. in 1822. His name having been entered at Lincoln's Inn, he became a pupil of the late Lord Cottenham, and in July, 1821, he was called to the Bar. Shortly afterwards he edited a volume of Chancery Reports, in conjunction with the late James Russell, Esq., Q.C. In May, 1840, he became a Q.C., simultaneously with Mr. Bethell, now Lord Westbury, who was two years his junior. From 1847 to 1851, he was M.P. for Coventry in the liberal-conservative interest. On the retirement of Sir James Wigram, in 1851, he was made Vice-Chancellor, and on that occasion he received the honour of knighthood. Two years later, on Lord Cranworth's becoming Lord Chancellor, Sir George was promoted to be Lord Justice of the Court of Appeal, as the colleague of the late Sir James Lewis Knight Bruce, and in 1857 the late Lord Justice was sworn a member of the Privy Council. The deceased was, at the time of his death, a governor of the Charterhouse. His reputation as a most able and profound lawyer, was universally recognised by the profession.

THE LATE SIR S. VILLIERS SURTEES.

The death of Sir Stephenson Villiers Surtees, formerly Chief Justice of the Mauritius, took place on the 19th of April last, at his residence in Staffordshire. The deceased was born in 1803, and was



educated at University College, Oxford, and was second class in classics in 1826. Subsequently he took the degree of B.C.L. In 1831 he was called to the Bar by the Hon. Society of the Middle Temple, and was appointed advocate at St. Lucia. afterwards to the Chief Justiceship of the Mauritius, which office he resigned in 1860.

## EXAMINATION AT THE INCORPORATED LAW SOCIETY.

*Easter Term, 1867.*

THE Examiners have recommended the following gentlemen under the age of 26, as being entitled to honorary distinction, Samuel Learoyd, W. Frederick Baker, Gregory W. Byrne, and T. Shallcross Hines.

The Council of the Society have accordingly awarded the following prizes of books:—to Mr. Learoyd the prize of the Honourable Society of Clifford's Inn; to Mr. Baker the prize of the Honourable Society of New Inn; to Mr. Byrne and Mr. Hine prizes of the Incorporated Law Society.

The Examiners have also certified that the following candidates under the age of 26 passed examinations which entitle them to commendation. J. Jolly Bentham, J. Walter Clulow, John Nelson, V. J. Yardly Shaw. The Council have accordingly awarded them certificates of merit.

Number of candidates examined 81, passed 67, postponed 14.

*Trinity Term, 1867.*

The Examiners have recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Ralph Hutchinson Young, Charles Mylne Barker, Walter Gardiner, and Albert Lewis.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Young, the prize of the Honourable Society of Clifford's Inn; to Mr. Barker, the prize of the Honourable Society of New Inn; to Mr. Gardiner and Mr. Lewis, prizes of the Incorporated Law Society.

The Examiners also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitled them to commendation:—William Archer, Ellery Arthur Bennett, John Copland, Francis Nathan Drake, Charles Godfrey Esam, Jasper Gibson, William Harper, Robert Hunter, M.A., Hugh Stirling, M.A., and Charles Henry Turner. The Council have accordingly awarded them certificates of merit.

The number of candidates examined in this term was 130; of these, 118 passed, and 12 were postponed.

## BAR EXAMINATIONS.

*Trinity Term, 1867.*

At the general examination of students of the Inns of Court, held at Lincoln's-inn-hall, on the 23rd, 24th, and 25th days of May, 1867, the Council of Legal Education awarded to T. De Courcy Atkins, Esq., student of the Middle Temple, a studentship of 50 guineas per annum, to continue for a period of three years. To Cecil Allen Coward, Esq., student for the Inner Temple, an exhibition of 25 guineas per annum, to continue for a period of three years. To Edmund Henry Turner Snell, Esq., student of the Middle Temple, and to Edward Holland Bennet, Esq., and John William James Stephenson, Esq., students of the Inner Temple, certificates of honour of the first class.

Nicholas Atkinson, Esq., student of the Inner Temple; Arthur Davenport, Esq., student of Gray's-inn; John Charles Henry Flood, Esq., student of the Middle Temple; Jonathan Cremer Gillbanks, Esq., student of the Inner Temple; Edward Grey, Esq., student of Lincoln's Inn; Thomas Lewis Ingram, Esq., Gideon Pulteney Johnstone, Esq., and Wilmot Lane, Esq., students of the Middle Temple; Phirozeshah Meherwanjee Mehta, and Henry James Parsons, Esq., students of Lincoln's Inn; John Timbrell Pierce, Esq., student of the Middle Temple; John William Reid, Esq., student of Lincoln's Inn; Francis William Reitz, Esq., student of the Inner Temple; Robert Romer, Esq., and Robert Goulder Slipper, Esq., students of Lincoln's-inn; Charles Henry Spitta, Esq., student of the Middle Temple; Oswald Innes Steele, Esq., student of the Inner Temple; Sidney Strong, Esq., student of Gray's Inn; Thomas Tomlinson, Esq., and John Charles Veasey, Esq., students of the Middle Temple; George William Vidal, Esq., Roland Knyvet Wilson, Esq., and James George Wood, Esq., students of Lincoln's-inn, certificates that they have satisfactorily passed a public examination.

The annual prize of £25 (an exhibition founded by John Lee, Esq., Q.C., LL.D., late a bencher of the Gray's Inn, deceased), for the best essay selected for this year, "What contracts can be enforced (having regard to the 17th section of the Statute of Frauds), and whether any, and (if any) what alteration is desirable in that respect," was awarded to Mr. John Rose, a student of the society; and the subject of the essay for the ensuing year was announced to be as follows: "When the property of any person is injured by a public company within the Lands Clauses Consolidation Act, 1845, carrying on their ordinary business with ordinary care, on their adjoining land, is he entitled to redress? If so, by what test is his right to be ascertained, and how is it to be enforced?"

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## CALLS TO THE BAR.

*Easter Term, 1867.*

MIDDLE TEMPLE.—J. H. Turner, Esq., George Shee, Esq., LL.B., Trinity Hall, Cambridge; Budrooden Tyabjee, Esq.; Isaac Badcock, Esq., B.A., Trinity College, Oxford; Richard Sanders, Esq.; R. W. M. Bird, Esq.; F. M. Adams, Esq., B.A., Sydney Sussex College, Cambridge; W. S. Garnett, Esq., B.A., Trinity College, Dublin; Emile Vaudayne, Esq.; F. H. Airce, Esq., and F. O. Crump, Esq., of Queen's College, Cambridge.

LINCOLN'S INN.—Jammatt Browne, Esq., B.A., Oxford; C. H. Robarts, Esq., M.A., Oxford; Hon. F. G. Dutton, Esq., B.A., Oxford; H. S. Brandreth, Esq., B.A., Cambridge; B. M. Smith, Esq., B.A., Oxford; Hon. R. C. E. Abbott, M.A., Oxford; Arthur Loughborough, Esq., B.A., Oxford; C. M. Fulford, Esq., B.A., Cambridge; R. S. Stephen, Esq., B.A., Cambridge.

GRAY'S INN.—William Gouldthorpe, Esq.

*Trinity Term, 1867.*

INNER TEMPLE.—John William James Stevenson, Esq. (certificate of honour first class), B.A., Cambridge; William Julius Marshall, Esq., M.A., Oxford; Stephen Charles Martin Lanigan, Esq., B.A., Dublin; William Jenkins, jun., Esq., B.A., Oxford; Henry Fletcher Pooley, Esq., M.A., Cambridge; Nicholas Atkinson, Esq., Queen's College, Galway; Charles Walter Clifford, Esq., B.A., Oxford; Nathaniel Baker, Esq.; Robert George Glenn, Esq., LL.B., Cambridge; Henry Hoyle Howorth, Esq.; James Lewis, Esq., M.A., LL.D., Cambridge; Charles Paine Pauli, Esq., B.A., Oxford; Wynne Albert Pankes, Esq., B.A., Cambridge; Morris Davies, Esq.; Stanley Edward Hicks, Esq., B.A., Cambridge; and Francis William Reitz, Esq.

MIDDLE TEMPLE.—Thomas de Courcy Atkins Esq., B.A., Associate King's College, London; Exhibitioner Equity, 1865, and Common Law, 1866; Certificate of Honour, first class, Michaelmas, 1866, and Studentship Trinity, 1867. Edmund Henry Turner Snell, Esq., B.A., B.L., Madras holder of Certificate of Honour, first class, Trinity, 1867; David Mitchell Aird, Esq.; William Evans Stokes, Esq., Queen's College, Oxford; Thomas Lewis Ingram, Esq.; Charles Wager Ryalls, Esq., LL.B., Trinity Hall, Cambridge; the Hon. Edward Frederick Kenyon, B.A., Trinity College, Cambridge; John Charles Henry Flood, Esq., University of London; Baldwyn Francis Fleming, Esq.; William Henry Cooke, Esq., B.A., University of London; Andrew Bowman, Esq., M.A., University of Sydney; Edward Bowman, Esq., M.A., University of Sydney; Antony George Shiell, Esq., LL.B., St. Peter's College, Cambridge; Henry Savill Young, Esq., Brasenose College, Oxford; Henri Galea, Esq.; Edwin Lawrence, Esq., LL.B., B.A., London; Ernest Frederick Abbott,

Esq., LL.D., Heidelberg; Hippolyte Le Miere, Esq.; Woomes Chunder Bonnerjee, Esq.; William Alleyne Bishop Culpeper, Esq.; James Perronet Aspinall, Esq., B.A., London University; William Anthony Musgrave Sheriff, Esq.; and Joseph Washington Flood, Esq.

LINCOLN'S INN.—John Mott Maidlow, Esq., M.A., Oxford; George Parker, jun., Esq., James Bryce, jun., Esq., B.C.L., Oxford; Arthur William Trollope Daniel, Esq., B.A., Cambridge; James Hutchinson Hutchinson, Esq., M.A., Oxford; Robert Romer, Esq., M.A., Cambridge; Allan Maclean Skinner, jun., Esq.; Roland Knyvet Wilson, Esq., M.A., Cambridge; Arthur Duncombe, jun., Esq., M.A., Oxford; James Joseph Mac-Laren, Esq., B.A., Cambridge; Sir Francis Wood; Robert Goulder Slipper, Esq., B.A., Oxford; Henry Fellowes, Esq.; Govind Withul Kurkure, B.A., Cambridge; Richard Marsden Pankhurst, Esq., LL.D., London; and Gerald Frederick de Livera, Esq., Oxford.

GRAY'S INN.—Henry Blake Goodhall, Esq., of Allahabad, India, and Sidney Strong, Esq.

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#### APPOINTMENTS.

SIR John Rolt, Attorney-General, has been appointed Lord Justice of Appeal, in the room of Lord Justice Turner, deceased; Sir John B. Karslake succeeds as Attorney-General; and Mr. C. Jasper Selwyn as Solicitor-General.

Mr. Baliol Brett, Q.C., M.P., has been appointed Judge of the Admiralty Court in the place of Dr. Lushington.

Sir Robert J. Phillimore, Q.C., D.C.L., has been appointed Queen's Advocate-General.

Mr. Henry C. Lopes, of the Western Circuit, has been appointed Recorder of Exeter, in the place of Mr. J. S. Stock, Q.C., deceased.

Mr. Charles Lempriere, of the Western Circuit, has been appointed Secretary of the Bahamas, with residence at Nassau.

Mr. Edward Bloxam (Bloxam, Hawkins, and Co.) has been appointed Chief Clerk of the Court of Chancery in the place of the late Mr. Weatherall.

Mr. Christopher Moorhouse, Town Clerk of Congleton, has been elected Deputy-Town Clerk of Liverpool.

SCOTLAND.—Archibald Broun, Esq., of Johnston Burn, Senior Advocate Depute, has been appointed to the office of one of the principal Clerks of Session, vacant by the resignation of Mr. Currie.

IRELAND.—Mr. Henry Empson, of Dublin, has been appointed Sessional Crown Solicitor for the King's County; Mr. William Lawler, Clerk of the Crown for the County of Roscommon, in the place of Mr. W. Young, resigned; Mr. Adam Mitchell, of Parsonstown and Dublin, Sessional Crown Solicitor for the King's County; and Mr. Benjamin Witney, Solicitor, Clerk of the Crown for the County Mayo.

Mr. John George Gibbon has been appointed Counsel to the Attorney-General; and Mr. H. Oliver Barker, Barrister-at-law, Assistant-Registrar of Deeds in the Registration Office.

**AFRICA.**—Mr. George French, of the Equity Bar, has been appointed Chief Justice of the Colony of Sierra Leone.

**IONIAN ISLANDS.**—The Queen has conferred on Sir George Marcoran, late member of the Supreme Council of Justice in the Ionian Islands, the Grand Cross of the Order of St. Michael and St. George.

**CEYLON.**—Mr. Charles Henry Stewart has been appointed Puisne Judge of the Supreme Court in the Island of Ceylon.

**GIBRALTAR.**—Mr. E. J. Baumgartner has been appointed Master-Registrar and Clerk of Arraigus of the Supreme Court of the City and Garrison.

**MALTA.**—Mr. Lorenzo Xuereb, LL.D., has been appointed a Puisne Judge.

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## Necrology.

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### *April.*

- 17th. GARWOOD, WILLIAM, Esq., Solicitor, aged 67.
- 18th. WARDELL, A. HENRY, Esq., Clerk of Indictments to the Norfolk Circuit, aged 52.
- 20th. BROWN, F. LEWIS, Solicitor, aged 67.
- 21st. CLAYTON, MATTHEW, Solicitor, aged 66.
- 21st. HAWKE, JOHN, Esq., Solicitor, aged 46.
- 23rd. SYKES, EDWARD, Esq., Barrister-at-Law, aged 54.
- 24th. MURRAY, W. H. Esq., Barrister-at-Law, aged 43.
- 29th. BENTLEY, MICHAEL, Esq., Barrister-at-Law, aged 75.
- 30th. PAYNE, SAMUEL, Esq., late Registrar to the Leeds Bankruptcy Court, aged 84.

### *May.*

- 1st. ROBINSON, G. MILLAR, Esq., Solicitor, aged 49.
- 2nd. PORLINGTON, A., Esq., Solicitor, aged 54.
- 4th. ANDREWS, THOMAS, Esq., Solicitor, aged 39.
- 6th. BARRETT, C. P., Esq., Solicitor, aged 52.
- 6th. ROBSON, CHRISTOPHER, Esq., Solicitor, aged 60.
- 7th. LOVELL, C. FORSTER, Esq., Barrister-at-Law, aged 38.
- 7th. STOCK, J. SHAPLAND, Esq., Q.C., aged 62.
- 10th. MYERS, WILLIAM, Esq., Solicitor.
- 12th. JEFFERY, J. EWING, Esq., Solicitor, aged 55.
- 15th. BRABANT, W. HUGHES, Esq., Solicitor, aged 59.
- 20th. ASHLEY, HENRY, Esq., Solicitor, aged 77.
- 20th. WAMBAY, S. J., Esq., D.C.L.
- 21st. HAWKINS, JOHN, Esq., Solicitor, aged 68.
- 26th. PHILLIPS, SIR THOMAS, Q.C., aged 65.
- 27th. BICKNELL, SAMUEL, Esq., Solicitor.
- 30th. SPARROW, C. F., Esq., Solicitor, aged 45.

*June.*

- 1st. WATTS, EDWARD, Esq., Solicitor, aged 62.
- 1st. MERRIMAN, T. BAVERSTOCK, Esq., Solicitor, aged 64.
- 3rd. FRASER, JOHN, Esq., Solicitor, aged 75.
- 7th. HARTEY, WILLIAM, Esq., Solicitor.
- 10th. PRATER, HENRY, Esq., Barrister-at-Law, aged 63.
- 11th. NEWBURN, FRANCIS, Esq., Solicitor, aged 82.
- 12th. COBBY, CHARLES, Esq., Solicitor, aged 81.
- 18th. SANDS, WILLIAM S., Esq., Barrister-at-Law, aged 57.
- 19th. STEPHENSON, H. SIMPSON, Esq., Solicitor, aged 43.
- 20th. SANDYS, W. G., Esq., Solicitor, aged 40.
- 20th. FAWDEY, FREDERICK, Esq., Solicitor, aged 38.
- 22nd. FERGUSON, J. W., Esq., Barrister-at-Law.
- 25th. BRIGGS, THOMAS, Esq., Solicitor, aged 81.
- 28th. HORNER, THOMAS, Esq., Solicitor, aged 77.
- 30th. BALL, EDWIN, Esq., Solicitor, aged 48.
- 30th. PEACOCK, LEWIS, Esq., Solicitor.

*July.*

- 1st. BRUCE, G. AMBROSE, Esq., Solicitor, aged 29. .
  - 5th. STEWARD, CHARLES, Esq., Solicitor, aged 54.
  - 6th. DAY, WILLIAM, Esq., Solicitor, aged 69.
  - 9th. TURNER, Right Hon. Lord Justice, aged 69.
  - 10th. TREHERNE, MORGAN, Esq., M.P., Barrister-at-Law, aged 59.
  - 11th. GANTHORPE, W. T., Esq., Solicitor, aged 47.
  - 12th. CROSSLY, JAMES, Esq., F.S.A., Solicitor, aged 63.
  - 12th. CROSBY, JAMES, Esq., Solicitor, aged 62.
  - 14th. JONES, T. WYNDHAM, Esq., Solicitor, aged 71.
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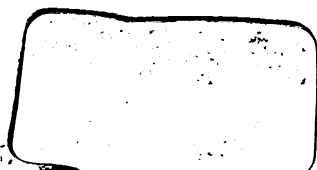


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